EELC

EUROPEAN EMPLOYMENT LAW CASES

2011 | 1

France: can staff transfer partially?

UK: TUPE applied internationally

Denmark: penalty for vague terms reduced

Italy: fixed-term contract abuse penalised

UK: bad reference is victimisation

Sdu UITGEVERS

www.eelc-online.com

EELC
European Employment Law Cases

Publishing information
EELC is published six times a year.
Subscription includes full access to:
www.eelc-online.com.

Contact for material
Peter C. Vas Nunes
BarentsKrans
P.O. Box 30457
2500 GL The Hague
The Netherlands
Tel: +3170 3760685
email: vasnunes@barentskrans.nl

Design
SD Communicatie

For further details please email
eelc@sdu.nl

Advertising
To inquire please call +31703789850 or email:
eelc@sdu.nl

ISSN
1877-9107

Subscription rates
One year, including access to website:
€ 245*

* for Dutch subscribers 6% VAT will be added

Sdu UITGEVERS
Nederlandse uitgeversverbond
Groep uitgevers voor vak en wetenschap

Introduction

This issue of EELC includes reports on cases that impact the everyday practice of European employment lawyers. The French case of *Lescail* is one. What happens to an employee who performs work for an entire company when only a part of its activities goes across to a transferee? The only time the ECJ ruled on this difficult issue was in 1985, in the *Botzen* case, but that ruling left many questions unanswered. Is an employment contract indivisible, or can it be split into two or more parts, each part being capable of transferring to another transferee? The French Supreme Court skirts this question and the comments from Austria, Finland, Luxembourg, The Netherlands and the UK on the *Cour de cassation's* two recent judgments (EELC 2011/1 and 2) indicate that the issue remains vexed in those countries as well.

The UK case of *Holis*, reported in this issue of EELC, highlights another problematic issue, namely what happens to the employees in a business that is transferred to another country, in this case from an EU Member State to a non-EU jurisdiction.

The *Siemens* case reported in this issue of EELC, besides illustrating the peculiar German doctrine of *Widerspruch*, serves as a reminder of how important it is for a transferor to comply with the obligation to inform the employees to be transferred fully and fairly.

The UK case of *Bullimore* (EELC 2011/6) is a warning to all employers. Ms Bullimore settled a discrimination case with her former employer. A few years after she left, she gave this former employer as a reference to another firm where she had applied for a job. The other firm asked her former employer for a reference. The reference mentioned the discrimination case and was less than flattering to Ms Bullimore, eventually causing her not to get the new job. The incident yielded her over £50,000 in compensation.

EU law requires employers to provide their employees with full and accurate information on their terms of employment. Until a recent judgment by the Danish Supreme Court (EELC 2011/10) this requirement was a favourite source of litigation in Denmark. The judgment limits the size of awards for failure to provide information. The question remains whether such a failure should lead to a reversal of the burden of proof (see EELC 2011/11).

In many European countries, Italy and Greece in particular, employee protection against dismissal has led employers, including the government, to resort to the use and, in some cases, the abuse of fixed-term contracts. This has led employees to fight back, using Directive 1999/70 as one of their weapons. This issue of EELC includes one Italian case report and summaries of no less than five ECJ judgments on the continuing debate on where to draw the line on the use of (successive) fixed-term contracts.

The ECJ's ruling in the *Test-Achats* case does not relate to employment law but is reported nonetheless in the *ECJ Court Watch* section, because it could prove to be a landmark case, for a number of reasons. One is whether insurers should be obligated to apply "unisex" premiums and benefits. May women be offered car insurance at a reduced rate because, statistically, they cause fewer traffic accidents? May they be charged more for a life assurance policy because of their relative longevity? These are hard questions that go to the heart of the equality doctrine. In this case, the ECJ took the rare step of declaring an EU directive to be invalid.

I take this opportunity to welcome Bulgaria to the Board of national correspondents for EELC.

April 2011
Peter Vas Nunes

TABLE OF CONTENTS

TRANSFER OF UNDERTAKINGS

DISCRIMINATION

MISCELLANEOUS

2011/1

What happens to the contract of an employee who works only partially for the transferred business?

COUNTRY FRANCE

CONTRIBUTOR CLAIRE TOUMIEUX AND SUSAN EKRAMI, FLICHY GRANGÉ AVOCATS, PARIS

Summary
When the employment contract of the employee is "mainly" performed in the transferred business activity, the entire contract is transferred to the transferee.

Facts
Mr Lescail was employed by Thomson Multimedia as its Finance & Administration Director. The business carried on by Thomson Multimedia related partially to television and partially to video/audio/accessories. On 1 September 2003, Mr Lescail was temporarily transferred to Thomson Multimedia's office in Hong Kong, where he worked as the Finance Director for Asia. In Hong Kong his work consisted of activities both in the field of television and in the field of video/audio/accessories. While he was in Hong Kong, Thomson Multimedia and TLC Electronics decided to merge their television business, creating for this purpose a new company named Thomson Electronics Europe ("TTE"), which took over their respective television businesses.
Thomson Multimedia informed Mr Lescail that pursuant to the French law transposing the Acquired Rights Directive 2001/23 (Article L. 1224-1 of the "*Code du travail*"), his employment contract was transferred to TTE in its entirety as of 1 July 2004. Mr Lescail contested such a transfer and brought an action against both Thomson Multimedia and TTE before the Industrial Tribunal ("*conseil de prud'hommes*"). He applied for judicial termination of his employment contract ("*résiliation judiciaire*"). This doctrine allows an employee whose employer fails to comply with its elementary duties to ask the court to terminate his or her contract and to award damages. Mr Lescail claimed approximately € 200,000 arguing that it was artificial to pretend that his employment contract related in its totality to the transferred activity, i.e. the television business, given that he also worked in other activities in the realm of video/audio/accessories, which had not transferred to TTE. He also argued that, in any case, TTE had failed to ensure the continuation of his employment contract, leaving him without any work or instructions from July 2004, the date of the transfer.
In the meantime, TTE ended Mr Lescail's assignment in Hong Kong and asked him to join its headquarters in France as of January 2005, where a redeployment job was waiting for him. Thomson Multimedia paid for his repatriation to France. TTE had taken over the payment of his monthly salary as of 1 July 2004.
On 6 February 2006, the Industrial Tribunal dismissed Mr Lescail's application for "*résiliation judiciaire*". The result was that his employment with Thomson Multimedia and/or with TTE continued (the issue of who employed him being left undecided). A few days later, TTE dismissed him for prolonged insubordination, alleging that he had failed to perform his assignments and had systematically turned down all of the redeployment positions proposed to him.
Mr Lescail appealed, asking the appellate court to reconsider his claim of "*résiliation judiciaire*" and, alternatively, to rule that his dismissal was unfair.
A few months later TTE went into liquidation and a liquidator was appointed who joined the appeal against Thomson Multimedia, claiming that Mr Lescail's employment contract had transferred to TTE only in part, namely for that part of his employment that related to the television business. In the liquidator's reasoning, TTE should only have paid a proportional part of Mr Lescail's salary instead of paying him his full salary and Thomson Multimedia should have paid the remaining part of his salary (i.e. the portion relating to his responsibility for the video/audio/accessories business).
The Court of Appeal, in a judgment dated 28 February 2008, rejected Mr Lescail and the receiver's claims, ruling that "*the transfer of the total television business of Thomson Multimedia to TTE had entailed the transfer of all contracts related to this activity*" and that, as Mr Lescail was assigned "mainly" to that activity, he could not object to the transfer of his employment contract.
However, the Appeal Court held that the employee's dismissal was without real and serious cause.

Judgment
The Supreme Court affirmed the Court of Appeal's judgment by holding that "*the employment contract of the employee was performed mainly in the business sector transferred to TTE, therefore the Court of Appeal had correctly ruled that his whole employment contract had been transferred to TTE, even though he had continued to carry out duties in a sector still managed by Thomson Multimedia*".

Commentary and Comments from other jurisdictions

See next case report.

Parties: *Lescail* – v – *Thomson Electronics Europe*
Court: *Cour de cassation* (French Supreme Court)
Date: 10 March 2010
Case number: Cass. Soc. no 08-42065
Internet publication: www.legifrance.gouv.fr

2011/2

What happens to the contract of an employee who works only partially for the transferred business?

COUNTRY FRANCE

CONTRIBUTOR CLAIRE TOUMIEUX AND SUSAN EKRAMI, FLICHY GRANGÉ AVOCATS, PARIS

Summary
When the application of Article L. 1224-1 of the Labour Code results in a change of the employment contract for the transferred employee, other than a change of employer, he or she is entitled to object to such a change. It is then the transferee's duty, if it cannot maintain the

employee's previous working terms and conditions, to either formulate new proposals, or if the employee refuses to accept those proposals, initiate a dismissal proceeding. Failing to do so will entitle the employee to file for the judicial termination of his or her employment contract, which will have the same consequences as a dismissal without real and serious cause.

Facts

Mr Zubiarrain was employed by Carbones Bel Printer ("Carbones") as a sales person ("VRP") whose duty it was to sell office equipment and printing services, with exclusive rights in respect of the company's customers. On 1 October 2002, the company's printing activity was transferred to a company named "Printer". Presumably[1], Mr Zubiarrain continued to work for Carbones. A few months later, however, its office equipment activity was transferred to another company named "Office Depot" and Mr Zubiarrain was informed that from then on Office Depot would be his employer.

Claiming that the transfer of his employment contract to Office Depot had resulted in a unilateral change of his employment contract, Mr Zubiarrain applied to the Industrial Tribunal, seeking judicial termination of his employment contract ("*résiliation judiciaire*"). He pointed out that he no longer had the status of an exclusive VRP in respect of Office Depot's customers, given that Office Depot had its own network of sales persons within the stationery sector.

In its defence, Office Depot claimed that Mr Zubiarrain's employment contract had only transferred to Office Depot in part. In its view, Mr Zubiarrain had transferred partially to Printer (to the extent that his work related to the printing business) and partially to Office Depot (to the extent that his work related to the office equipment business). Given this split in his employment contract, he could not claim to be an exclusive VRP, since his activity no longer depended on one employer but two. Finally, if new terms and conditions needed to be discussed with the employee, it was the duty of both employers, not only Office Depot, to revise the terms of his employment contract.

The Industrial Tribunal ruled in favour of *"résiliation judiciaire"*, attributing the fault for the dispute entirely to Office Depot.

The Court of Appeal, in its decision dated 2 July 2008, confirmed the decision of the Industrial Tribunal, holding that *"since various agreements between Carbones Bel Printer, Printer and Office Depot would inevitably lead to substantial changes in the employee's initial employment contract (exclusivity and terms of payment), Office Depot should have responded to the employee's requests to review the conditions of his employment contract that had become unsuitable in the new economic framework. Therefore, by not responding to his repeated requests, the company had committed a breach of its duties sufficiently seriously to warrant judicial termination of the contract, in a way which was exclusively the employer's fault and produced the same effects as a dismissal without real and serious cause"*.

Judgment

The Court of Appeal's decision was confirmed by the Supreme Court, which held *"When the application of Article L. 1224-1 of the Labour Code results in a change of employment contract other than a change of employer, the employee is entitled to object. In such a case, the transferee, which is unable to maintain the employee's previous terms and conditions, must either formulate new proposals or, if the employee refuses those proposals, initiate dismissal proceedings; if the transferee fails to do so, the employee may file for the judicial termination of the contract, which then produces the effect of a dismissal without real and serious cause, without prejudice to any recourse between successive employers"*.

The Supreme Court finally held that *"Since the partial transfer of the employment contract to Office Depot had resulted in the employee losing his status as exclusive VRP and the exclusivity he previously enjoyed with the customers, the employer should have made new proposals to the employee or have initiated a dismissal procedure if he refused those proposals. Failing to do so gave the employee the right to ask for the judicial termination of his employment contract with the same consequences as an unfair dismissal"*.

Commentary

What happens to the employment contract of an employee who is only "partially" assigned to the transferred business?

The answer was already given in a decision dated 2 May 2001[2], where the Supreme Court held that in such a case *"the employment contract is transferred in part to the transferee"*. However, that ruling had the disadvantage of leading to the fragmentation of one full-time employment contract into two part-time employment contracts with two distinct employers who could even be classed as competitors with divergent interests.

Two rulings made on 30 March 2010 bring new answers to the problem. The first decision offers a very pragmatic solution by providing for the "indivisibility" of the employment contract, whereas the second decision does not call into question the divisibility of the employment contract, but instead provides for how to deal with its consequences.

In the first case, the Supreme Court offers a radical yet practical solution by distinguishing between the employee's main activity and his or her accessory activity. In accordance with the Supreme Court's reasoning, if the employee's "main" activity transfers, his or her contract goes across to the transferee in its totality. We can only approve of such a solution. A previous (but overlooked) decision of the Supreme Court had already found that an employee *"substantially assigned"* to the transferred business must be totally transferred to the transferee, hence the concept is not new.

The fragmentation of an employment contract, apart from the inconvenience for the employee whose employment contract is divided into two part-time contracts with two distinct employers, seems to be inconsistent with Article L. 1224-1 of the Labour Code, which by its very nature provides for a total transfer of the employment contract. The Supreme Court's position is commendable, since it avoids the fragmentation of the employment contract and therefore its dire consequences. Finally, the Supreme Court's new approach seems to be consistent with that of the ECJ. Indeed, in 1985 the ECJ declined to accept the transfer of employees who are assigned to a service that has not been subject to transfer, even though they perform certain tasks for the transferred service[3].

In the second decision, the Supreme Court does not refute the partial transfer of the employment contract to the transferee, but comments on the options open to the employee when such a transfer entails a change in his or her employment contract. In accordance with the Supreme Court's ruling, if the employee cannot object to his or her transfer, which is automatic under Article L. 1224-1, he or she may object to other contractual changes resulting from the transfer (here for instance, the loss of exclusivity for Mr Zubiarrain). In such a case, the transferee must obtain the employee's consent to such changes by renegotiating his or her employment conditions and, if the employee

refuses, should initiate a dismissal procedure. Failing to do so will entitle the employee to apply for the judicial termination of his or her employment contract, which will have the same consequences as an unfair dismissal.

If this decision provides a guarantee for the transferred employee without jeopardising the partial transfer of the employment contract, the Supreme Court has left unanswered one obvious question: on what grounds should the transferee dismiss the employee, given that by refusing to accept changed circumstances, he or she is not at fault? Should the employee's refusal be deemed as *sui generis* grounds for termination? This point remains to be clarified by the Supreme Court.

Finally, there remains the issue of the transitional period between the time the employee is transferred and the time the transferee starts renegotiating the employment terms and conditions. What if the transferred employee applies for judicial termination of his or her employment contract without giving the transferee enough time to reopen negotiations?

In any case, implementation of the Supreme Court's ruling will remain difficult and is likely to be a source of future litigation.

Comments from other jurisdictions

Austria (Andreas Tinhofer): Under Austrian law, it is common that the transfer of only part of a business cannot result in a split of the employment contract. In such a situation the courts regularly apply the *Botzen* doctrine of the ECJ. In Austria this means that employees who work in an "administrative department" (e.g. finance, HR or IT) providing services to all or several other departments, do not transfer unless their unit is transferred to another employer. If, however, an employee is employed in several departments, the question of in which department the focus of his or her activities lies, must be addressed. The employee will only transfer if the owner of this specific department changes. A number of authors of legal literature advocate a more functional approach, although the specific details are still controversial.

I assume that in the *Lescail* case an Austrian court would have held that the employee, being the Finance Director, did not transfer to TTE as a result of the hiving-off of his employer's television business. Based on the facts provided, it is not clear to me why the French Court of Appeal decided that the employee had contributed largely to the transferred activity.

In Austria, the outcome of the *Zubiarrain* case would depend on various facts that are not mentioned in the report. In essence, the judge would need to assess all the relevant factors of a business transfer by applying the relevant ECJ case law. Only then would it be possible to decide whether there has been a business transfer (or two of them) at all (the transfer of one activity only would not qualify as a business transfer). If the employee has not been "substantially assigned" to one of these two "economic entities" (i.e. printing and office equipment), legal literature maintains that he or she has the right to choose to which new employer he or she will transfer.

Finland (Karoliina Koistila): under Finnish law, the transfer of an employee's employment under a transfer of business will depend on whether he or she performs tasks predominantly in the unit being transferred (e.g. as addressed in the Finnish Supreme Court case of *KKO*:1994:3). That the employee also performs other tasks is not relevant. The transfer of his or her employment would occur automatically on the date of the transfer of business. The employee could not insist on remaining with the old employer (although the parties could agree otherwise).

If an employee has temporarily been performing tasks other than his or her normal ones (such as being "on loan" to another department), it is the normal ones that will be taken into account in evaluating whether the employee should transfer.

A partial transfer would nonetheless seem alien under Finnish law. Instead, it has been suggested in legal literature that in exceptionally complex cases, where the employee's work is divided evenly between the transferring unit and other parts of the company, he or she might be permitted to choose whether to transfer or stay. However, in a transfer of business the general rule is that an employee's choice would be limited to accepting a transfer or terminating the employment.

Germany (Paul Schreiner): As a general rule, the situation in Germany differs in two main aspects from the French one.

Firstly, in Germany every employee has the right to oppose the transfer of his or her employment to another employer. The basic reason for this is that the right to conclude and maintain an employment relationship is part of an individual's personal rights, as provided by the German Constitution. This principle is found expressly in s613(a) of the German Civil Code, which reads as follows:

"(6) The employee may object in writing to the transfer of the employment relationship within one month of receipt of notification under subsection 5. The objection may be addressed to the previous employer or to the new owner."

The employee does not need to show any valid reason for the opposition.

Secondly, under German law the employer does not need to make redundancy payments, unless a social plan has been concluded with the works council. Such a social plan does not need to be established, unless more than a few contracts of employment need to be terminated. Therefore, termination of the employment contract is less attractive for an employee in Germany because of the lack of redundancy payments.

Nevertheless, the principal question of how an employment contract that relates to two different parts of the company must be treated in the course of a transfer of undertaking, is still relevant in Germany.

If the tasks the employee originally performed relate to two different parts of the establishment and are then transferred to different new employers, the existing employment relationship will be transferred as it is, but it will not be split up.

To determine which transferee will become the new employer, it must be decided which part of the establishment the employment contract belonged to (in the sense that the employee was integrated into the transferred part of the establishment), if any. A typical example would be the so-called overhead functions, such as HR or payroll departments, which typically render their services for various other departments. If one of the other departments is transferred to a different employer, the overhead functions will typically not transfer, since the employees are not integrated into these departments (this is one requirement for a transfer of undertaking). However, in the cases concerned the employees apparently did not work in such overhead functions, but

still rendered their services for more than one part of the business. In such a scenario, German case law examines what the main focus of the employment was, comparable to the situation in *Lescail*. If this cannot be determined, the situation remains unclear. Opinion is split, ranging from the employee having the right to make a choice, to the employer making the choice unilaterally.

Luxembourg (Michel Molitor): Luxembourg's case law has applied a similar approach to the French Supreme Court in the case of *Lescail*. An employee of a catering company ("Caterer A") claimed to be part of a business that had been transferred to a new Caterer ("Caterer B") and applied to be reinstated as an employee of Caterer B. Caterer B made reference to the *Botzen* doctrine, claiming that this employee was not employed in the transferred part of the undertaking, although he carried out certain duties for the benefit of the part transferred. Therefore, Caterer B refused to consider this employee among the transferred employees. The employee and Caterer A disagreed and claimed that his activities were mainly performed in the framework of the transferred activities.

To settle the dispute, the Luxembourg Labour Tribunal ("*Tribunal de travail de et à Luxembourg*") ruled that it was necessary to examine whether or not the activities of the employee were mainly ("*à titre principal*") carried out in the scope of the business transferred to Caterer B. The Luxembourg Labour Tribunal then held that the employee had indeed mainly provided his activities in the field of the transferred business and that Caterer B therefore had a duty to reinstate him (Luxembourg Labour Tribunal, 3 March 2006, no 1123/2006). The Luxembourg Labour Tribunal only took into account the main activities of the employee to determine whether that employee should or should not be included among the transferred employees.

The Netherlands (Peter Vas Nunes): In the *Lescail* case, the French Supreme Court seems to adopt the theory that an employment contract is indivisible and therefore either goes across to the transferee in its entirety, or not at all. However, it does not say so explicitly. In the *Zubiarrain* case, the court did not need to rule on the issue of (in) divisibility, but it seems to leave open the possibility that an employee's contract is split into two parts. I would be surprised if a Dutch court accepted such a split, with the possible exception that this might be allowable in the event all parties concerned are explicitly agreed to the split. In all other circumstances a Dutch court will almost certainly see the employment contract as being indivisible.

The "*Cour de cassation*" applies as a decisive criterion the sector of activity in which the employee's contract is "mainly" performed. The French expression for this is "*l'essentiel*". Clearly, this criterion raises questions. For example, does the court essentially reason that if, for example, an employee in a company's head office (e.g. a corporate lawyer or HR Director) spends on average fifty one per cent of his or her working time on a certain activity and that activity is transferred, he or she will go across to the transferee? Alternatively, if it is forty nine per cent, does it reason that he or she will remain with the transferor? Unfortunately, the ECJ's 1985 ruling in the *Botzen* case remains the only guideline for Dutch courts, and that ruling is unclear.

As chance would have it, a Dutch court recently ruled on this issue for the first time since *Botzen* (Lower Court of Amsterdam 14 October 2010 LJN: BP6114). A catering firm had a contract under which it managed all 11 canteens of a company. These canteens served a total of over 14,000 employees. The catering firm lost the contract in respect of five locations (serving almost 6,000 employees), retaining the contract in respect of the remaining six locations (serving over 9,000 employees). The plaintiff was the manager in charge of all 11 canteens. The court held, wrongly in my view, that there was no transfer of an undertaking, as the original business of managing 11 canteens had lost its identity. Normally speaking this would have been the end of the case. However, the collective agreement that governed the parties' contract provided that in the event a contract is lost, the party winning the contract must offer the relevant employees a contract. Did this obligation rest on the plaintiff's original employer (which retained six canteens), on its competitor (which acquired five canteens), on neither or on both? The court found that neither company had this obligation.

United Kingdom (Bethan Carney): There have been several UK cases considering what should happen when:

- an employee works in different parts of a business and only one part is transferred; or
- different parts of a business are transferred to separate transferees, essentially splitting the employment contract.

The approach the UK courts have taken is similar to the decision in *Lescail*: the employment contract is never divided between two employers, even if the employee's duties relate to parts of the business that end up in different hands. Instead, the UK courts have tried to apply the ECJ's judgment in *Botzen,* which said that an employee will transfer if he or she is "assigned" to the undertaking that transfers. The question of whether or not an employee is "assigned" to a particular part of a business is a difficult one and *Botzen* gives little guidance. According to UK case law, the test is not only about how much time the employee spends in each part of the business. So, an employee who spends less than fifty per cent of his or her time in the undertaking may still transfer and an employee who spends the majority of his or her time working for it may not.

One of the key authorities is *Duncan Webb Offset (Maidstone) Ltd v Cooper* [1995] IRLR 633, in which a company owned three subsidiaries at Maidstone, Basildon and St Albans. When the Maidstone business was sold, three employees of the company who worked about eighty per cent of the time for that business (the rest of their time being spent on the other operations) were found to transfer. The Employment Appeal Tribunal ("EAT") held that when deciding whether an employee is "assigned" to the undertaking being transferred, various factors may be relevant: the amount of time spent on the different parts of the business; the amount of value given to different parts of the business by the employee; the terms of the contract of employment showing what the employee could be required to do; and how the cost of the employee had been allocated to different parts of the business. However, the EAT emphasised this is not necessarily an exhaustive list and other factors may be relevant.

The case of *CPL Distribution Ltd v Todd* [2003] IRLR 28 illustrates how an employee will not necessarily transfer, even if he or she spends the majority of his or her time working for the undertaking transferred. CPL had lost a major contract from the British Coal Corporation and most of the employees transferred to the business that won the contract. The claimant (Todd) was a PA who, at the time of the transfer, was spending the majority of her time working on the contract that was lost. However, the Court of Appeal decided that she did not transfer since she had not been "assigned" to that contract. Rather, she had been assigned to work for a particular manager who was also not assigned to the contract but whose duties had varied and, at the time of the transfer, encompassed work on that contract and on other matters. Another instructive case is *Kimberley Group Housing Ltd v Hambley and others* [2008] IRLR 682*,* in which an employment tribunal tried to find

that liability for a contract of employment could be split between two different transferees on a percentage basis. However, the EAT dismissed this as a possibility. In this case, a company called "Leena" had a contract from the Home Office to provide accommodation to asylum seekers. It lost the contract in 2006 and the Home Office contracted instead with two new providers, Kimberley and Angel, and employees of Leena who had been engaged in providing the services lost their jobs. Six of those employees brought claims for unfair dismissal and the first instance decision was that liability for those claims passed on a percentage basis to both Angel and Kimberley. The tribunal considered that it could make this decision because the employees had been dismissed, so the question was how to allocate liability for paying compensation rather than which organisations the employees would work for. However, the EAT held that in neither case could liability be split between transferees and the tribunal should have applied the principles derived from *Botzen* and recognised in *Duncan Webb* (see above). The correct issue was whether the employees were assigned to the undertaking that passed to one of the transferees. If so, that undertaking would have complete liability for their future employment or to pay any unfair dismissal compensation.

(Footnotes)

1 The judgment is not specific on this point.

2 Cass. soc. 2 May 2001,no 2083 FS-P, *Evenas-Baro c/ SA Sonauto* and Cass. soc. 8 July 2009, no 08-42.912.

3 ECJ 7 February 1985, case 186/83 (*Botzen)*.

Parties: *Zubiarrain – v – Office Depot*
Court: *Cour de cassation* (French Supreme Court)
Date: 10 March 2010
Case number: Cass. Soc. no 08-44227
Internet publication: www.legifrance.gouv.fr

2011/3

TUPE potentially applies to cross-border transfers

COUNTRY UNITED KINGDOM

CONTRIBUTOR HILARY BURGESS, LEWIS SILKIN, LONDON

Summary
The United Kingdom legislation on transfer of undertakings (known as "TUPE") has the potential to apply to a transfer outside the UK's jurisdiction – and even beyond the European Union (EU).

Facts
Newell Ltd had a factory in Tamworth (in the UK) from where it operated a track, pole and blind manufacturing business[1].The plant had 180 workers, 76 of whom were represented by the GMB, a trade union. The company recognised the GMB for the purposes of collective bargaining. In February 2006, the workers were informed that Holis Metal Industries Ltd ("Holis"), a company based in Israel, was interested in acquiring the track and pole parts of the business, but not the blind section. The employees were informed during the consultation process that the 107 staff in the track and pole parts of the business (the "affected employees") would need to transfer to Holis, whose premises were based in Israel. They were told that, if the affected employees refused to move to Israel, they would be made redundant following the transfer. In April 2006, the track and pole business duly transferred from Newell Ltd to Holis. None of the affected employees moved to Israel and they were accordingly dismissed on grounds of redundancy.
Under Regulation 13 the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), both the transferor and the transferee of a business must inform and consult with appropriate representatives of the affected employees about the proposed transfer. Failure to comply with these requirements entitles the relevant recognised trade union or other employee representatives to bring a claim in the Employment Tribunal.
The GMB lodged claims against both Holis and Newell Ltd asserting, amongst other things, failure to inform and consult under TUPE. Holis applied for a pre-hearing review, requesting that the claims be struck out on the grounds that they had no reasonable prospect of success, since TUPE did not apply where a business was being transferred overseas. The issue that fell to be determined was whether TUPE would apply to a transfer of a business, which after the transfer would be based outside the UK and even outside the EU.
The Employment Tribunal found that, on the information available to it, the transfer and the redundancies had taken place within the jurisdiction and so TUPE might apply. It therefore refused to strike out the claim. Holis appealed on this point to the Employment Appeal Tribunal ("EAT").

The Employment Appeal Tribunal's Decision
Although the EAT dismissed Holis's appeal, it did not formulate a view as to whether TUPE applied to the transfer in this case. The EAT did however consider whether, as a matter of general principle, TUPE could apply where businesses are transferred overseas and outside the EU.
The EAT considered the wording of both TUPE and the EC Acquired Rights Directive ("ARD"). Regulation 3 of TUPE states that it applies to:

- a transfer of an undertaking where the undertaking is situated in the UK immediately before the transfer; or
- a "service provision change", where there is an organised grouping of employees situated in Great Britain immediately beforehand.

The ARD stipulates that it applies where the business transferred is situated within the territorial scope of the EC Treaty. Neither TUPE nor the ARD, however, expressly state whether they apply in circumstances where a business is transferred outside the UK and EU respectively.
The EAT noted that the wording of Regulation 3 of TUPE was precise in stating that it applied to undertakings situated immediately before the transfer in the UK. In view of the fact that the legislation was designed to protect the rights of workers on a change of employer, the EAT considered that *"a purposeful approach requires that those employees should be protected even if the transfer is to be across borders outside the EU"*.
Accordingly, the EAT's conclusion was that TUPE *"has the potential to apply to a transfer from the UK to a non-EU entity in the event that on the transfer the undertaking did not remain in the jurisdiction"*. The EAT was influenced by the fact that commentators were generally of the view that TUPE and the ARD would potentially apply to a cross-border transfer.

Commentary
This was the first case in the UK to tackle the issue of whether TUPE has cross-border application, in particular where the business transfers outside the EU. It was disappointing, however, that the EAT did not examine how TUPE principles might operate in practice in this

type of scenario.

The issue is important throughout Europe with cross-border transfers becoming increasingly common, particularly in the context of international outsourcing. Businesses increasingly look abroad for cost-effective solutions to performing "non-core" operations.

The application of the ARD to such transactions remains extremely uncertain. There have been no ECJ judgments offering guidance in this area and very few at national level. The European Commission has been reviewing the position but is understood to have shelved the idea of formulating a legislative proposal.

On a practical level, of course, the significance of this issue may be limited. Labour markets tend to be localised and there are relatively few scenarios in which employees would be willing to relocate with their job to another country. But the legal issues are nonetheless worth exploring.

The ARD states that it applies where "*an undertaking . . . to be transferred is situated within the territorial scope of the [EU]*". This suggests that the ARD does not apply, if an undertaking based *outside* the EU is transferred into the EU. On the other hand, it might be taken to imply that the ARD does apply, if the undertaking is based in the EU and is transferred either:

- within the EU to a different Member State; or
- to a country outside the EU.

When implementing the ARD, most Member States have limited the application of their transfers legislation to the situation where the undertaking to be transferred is within their own territory. But at least potentially, most national laws implementing the ARD may apply despite the fact that the transferee is abroad, whether inside or outside the EU. It would be sufficient for the entity in question to be situated in the "home" state at the time of the transfer.

One possibility is that the ARD does not apply because the relocation of an undertaking to a different country prevents it from "retaining its identity" under the *Spijkers* test. Most commentators are not persuaded by this argument, preferring the view that a geographical change should not in itself be sufficient to prevent the application of the ARD.

What are the implications of the ARD, if it does apply to the cross-border transfer of an undertaking? One analysis is as follows:

- The rights to information and consultation under the ARD would apply (as in the *Holis* case).
- Clearly, the ARD does not operate physically to transfer an undertaking or its staff. Its effect is limited to substituting the transferee employer for the transferor employer.
- The transferee employer takes on the staff on their existing terms and in their existing location.
- If the undertaking is moving to another country, the employees are likely to be potentially redundant because of the change of location.
- The transferee employer would be obliged to seek to avoid the redundancies and look for alternative work for the employees in question.

Take an outsourcing from the UK to Brazil, for example. If the transferee employer had an operation in the UK, it would be expected to consider alternative work there. If, as will more commonly be the case, the transferee employer had no operation in the UK, it would need to offer alternative work to the staff concerned in Brazil.

In the latter situation, a question might arise as to whether the offer of alternative work should be on the employees' existing UK terms of employment or on Brazilian terms. Whilst an offer on local Brazilian terms might appear to conflict with the purpose of the ARD, the reason for the change arguably would not be the transfer itself but the fact that the transferee had no operations in the UK and was relocating. That might constitute a permissible change for an "economic, technical or organisational reason".

In practice, it is unlikely that staff would wish to relocate (on whatever terms) and the issue could be avoided. In that scenario, it would be absurd for their employment to transfer to a transferee employer who had no base where they were located. They would be properly redundant, which would qualify as an "economic, technical or organisational reason" for their dismissals. What generally happens in practice is that the transferor implements the necessary dismissals, albeit in some instances with a financial contribution from the transferee.

The above example merely provides one possible analysis and is untested in the courts. The practical reality of international transactions is that employees generally do not wish to transfer abroad and are unlikely to envisage making claims against the transferee. Nevertheless, given the uncertain legal position, it is advisable for the parties to cater for these possibilities with suitable provisions in the transfer agreement, such as indemnities and apportionment of liabilities.

Comments from other jurisdictions

Germany (Paul Schreiner): The majority of German courts and authors of legal literature believe that s613(a) of the Civil Code (the German transposition of the Acquired Rights Directive) applies to cross-border transfers. The reason is that at the time of the transfer, German law applies and s613(a) does restrict cross-border scenarios, as long as the facts of the case indicate a transfer of undertaking in principle. The employment agreement does not change as a result of the transfer. The terms and conditions remain as they were before the transfer and tax and social security must comply with the law in the new location.

On the other hand, German case law suggests that a long distance transfer will often lead to significant change in the organisation and for that reason it must not be considered as a transfer of undertaking, but as a closure of the business.

German court cases regarding cross-border transfers are hard to find, but some do exist and they relate to transfers both inside and outside the EU (for example, Switzerland). A case involving a possible transfer to Brazil, however, would probably be seen as a closure of the business, and not a transfer of undertaking.

The Netherlands (Peter Vas Nunes):

1. There are, to my knowledge, five Dutch precedents, the most recent being the judgment published in EELC 2009/3. Earlier judgments concerned a relocation from The Netherlands to Belgium (Ktr. Amsterdam 8 August 1995 KG 1995, 339), a relocation from The Netherlands to Belgium (Ktr. Tilburg 26 July 2007 JAR 2007/259), a relocation from The Netherlands to a French parent company (Ktr. Zaandam 26 September 2007 JAR 2008/67) and the sale of a seagoing vessel from a Dutch to a Swiss owner.
2. Let us suppose that on date X a factory, located in the south of a medium-sized town ("the old location") is sold to a company that has a similar factory in the north of town and that the purchaser – the transferee – integrates the machinery, activities, business and staff of the purchased factory into its factory in the north of the town (the "new location"). I suspect that most workers and perhaps also most lawyers would assume that the workers who transferred into the employment of the transferee have a duty to work in the new location as from date X + 1, even if this involves increased commuting time. In my view such an assumption would be mistaken. The workers in this example transferred with all their terms of employment, including their existing location. This means that they would be entitled to continue working in the old location even though there is no work for them there anymore. Under Dutch law, workers who refused to perform their work in the new location would, in principle, retain their right to full salary

and benefits. Clearly, the transferee in this example would have the right to demand that the workers accept a change in their terms of employment, namely in the place where they perform their work, either unconditionally or, depending on the circumstances, with compensation for increased commuting time and expenses. In such a scenario, the workers would need to have strong arguments to continue refusing to go to the new location, risking a salary stop or even dismissal.

3. Why should a transfer of undertaking to a transferee located further away than the other side of town, or even in another country, be treated differently? I heartily agree with Hilary Burgess' analysis that *"the transferee employer takes on the staff on their existing terms and in their existing location"*. To me, it is clear that the ARD and the Dutch legislation transposing it apply to a transfer of an undertaking that is physically located in the EU to any place, whether it is in the same country, within the EU or outside the EU.
4. Hilary Burgess gives the example of a UK company that outsources an activity to Brazil, where the Brazilian transferee has no operation within the UK. The question might arise, so she writes, as to whether the offer of alternative work should be on the employees' existing new terms of employment or on Brazilian terms. In order to be able to answer this question, the first step would surely be to determine which law governs the question. In my view, this would be UK law and the answer to the question would be that the offer of alternative work (in Brazil) should, in principle, be on the employees' existing terms of employment. However, this would obviously lead to practical complications, if only because of the differences between the UK and Brazil as far as social insurance, tax law and other public (and therefore not negotiable) law is concerned. The basic principle, however, must surely be that the Brazilian transferee should offer to retain the employees' existing UK terms of employment, or at least equivalent terms.

(Footnote)

1 Tracks and poles are, respectively, rails and rods on which to hang curtains. Blinds are horizontally or vertically alligned parallel strips to block out or diffuse sunlight.

Subject: Transfer of undertakings
Parties: *Holis Metal Industries Ltd – v – (1) GMB (2) Newell Ltd*
Court: Employment Appeal Tribunal (England & Wales)
Date: 12 December 2007
Case number: UKEAT/0171/07
Hardcopy publication: [2008] IRLR 187
Internet publication: www.employmentappeals.gov.uk

EELC 2011/4

One-month deadline for exercising Widerspruchsrecht does not start to run if information to staff on impending transfer is misleading

COUNTRY GERMANY

CONTRIBUTOR PAUL SCHREINER, LUTHER RECHTSANWALTSGESELLSCHAFT MBH, ESSEN

Summary

Failure by an employer to inform the relevant employees correctly about an impending transfer of undertaking can be very costly.

Facts

The plaintiff was a Human Resources Manager in Siemens' mobile phone division. In the course of 2005, Siemens entered into an agreement with the Taiwanese company BenQ under which the latter took over the mobile phone division worldwide. In Germany, the transferee was BenQ Mobile GmbH & Co OHG. It acquired the German part of the division, including its workforce of approximately 3,300 employees.

The plaintiff was closely involved in the drafting of the information letter that was issued to the employees who were to transfer to BenQ. He helped to draw up the initial draft of the letter and was instrumental in amending this draft. However, he was not responsible for the contents of the letter. The final say on those contents lay in the hands of management, three hierarchical levels above the plaintiff.

The 3,300 (approximately) employees, including the plaintiff himself, transferred into the employment of BenQ on 1 October 2005. Less than one year later, on 29 September 2006, BenQ applied for insolvency and shortly afterwards it was declared insolvent, as of 1 January 2007. Its employees received no salary for the months of November and December 2006 and instead received (lesser) insolvency benefits.

Not long after BenQ became insolvent, it was discovered that the information letter had been misleading and inaccurate in a number of ways. It had incorrectly given the employees the impression that they would transfer into the employment of BenQ's ultimate parent company, whereas in reality their employer became a subsidiary that did not yet exist on the date of the transfer. Furthermore, the letter failed to mention that the purchase price for its mobile phone division was negative, Siemens having paid BenQ no less than € 350 million in consideration of it taking over the loss-making and heavily-indebted mobile phone division. The letter contained a number of other inaccuracies and misleading statements. In brief, the letter did not meet the requirements of Article 613(a)(5) of the German Civil Code, which is the German transposition of Article 7 of Directive 2001/23. This provision requires the transferor to inform the employees affected by a transfer of undertaking of, among other things, the reasons for the transfer and its legal, economic and social implications for them.

On 7 November 2006, approximately 1,500 out of the said 3,300 employees, including the plaintiff, notified Siemens that they opposed the transfer. They took the position that they had remained Siemens' employees, that they offered to work for Siemens and that they were therefore entitled to payment by Siemens of (i) their full salaries for the months of October 2005 to December 2006 (minus the salaries BenQ had paid them and the insolvency benefits they had received) and (ii) salary as of 1 January 2007. Siemens countered that the information letter, although not wholly accurate, was legally correct and that therefore the time limit of one month for opposing the transfer to BenQ as per section 613(a)(6) of the Civil Code had expired over one year previously. The employees did not accept this argument and brought a claim against Siemens.

In the case of the plaintiff, Siemens had an additional defence, as they argued that he had been actively involved in the drafting of the information letter. Therefore, even if its contents were in error, he had forfeited his right to rely on the letter's inaccuracies.

The court of first instance agreed with the plaintiff that he had retained his contract of employment with Siemens, but it denied his claim for compensation. Both parties appealed. On appeal, the "*Landesarbeitsgericht*" in Munich partially overruled the lower court's judgment and awarded the plaintiff compensation for the period from 17 November to 31 December 2006. Again, both parties appealed, this time to the "*Bundesarbeitsgericht*" ("BAG").

Judgment

The BAG ruled in favour of the plaintiff, reasoning as follows.

1. The one-month time limit for opposing a transfer into the employment of the transferee does not start to run until the transferor has informed the employee fully and accurately. As the information letter did not satisfy this requirement (a fact which the BAG had already determined in other cases arising out of the same Siemens-BenQ transaction), the plaintiff's notice of opposition on 7 November 2006 was timely.
2. There are circumstances in which an opposition to a transfer is in bad faith and the right to oppose the transfer is therefore forfeited. However, the circumstances in this case did not warrant such a loss of right, given that the plaintiff, when drafting the information letter, had acted on the instructions of his superior and was not responsible for the letter's final wording.
3. The plaintiff was entitled to payments from Siemens, although he had not performed any work for Siemens since 1 October 2005. Under German law, such a claim can be made in the event that the employer fails to offer employment. Therefore, usually the employee needs to offer to work, if he or she wants to bring a claim for compensation without actually rendering services. In the case at hand, however, Siemens had informed the employees in the information letter that their positions would cease to exist following the transfer. Therefore, the BAG held that the plaintiff had not been required to offer to work, since Siemens had already declared that it was not willing to accept his services any more. Therefore, the plaintiff was entitled to compensation for lost earnings for the entire period from 1 October 2005 to 31 December 2006[1]. The case was remanded back to the Court of Appeal to determine the exact quantum of the claim.

Commentary

In passing this judgment, the BAG confirmed its previous case law – that there are circumstances in which an employee forfeits his or her right to oppose a transfer. I concur with the BAG's view that such a loss of right should be limited to situations where the transferor was reasonably entitled to rely on the employee's acceptance of his or her transfer and where a certain period of time has elapsed without him or her indicating any intention to oppose the transfer.

In accordance with German case law, the party not acting in good faith must somehow have given the wrong impression to the other party. This, however, was clearly not the case in the situation at hand, since the plaintiff ultimately had no influence on the wording of the information letter and probably was not even privy to any further details than those he drafted. Therefore, the defendant could not rely on the fact that the plaintiff had not made use of his right to oppose the transfer.

This judgment also confirms the BAG's strict approach (similar to that of the Dutch Supreme Court as reported in EELC 2009/43), to the requirement that the transferor inform the relevant employees fully, correctly and honestly and that failure to do so can be very costly indeed. Siemens' misleading letter cost it millions. An employee must be able to make an informed decision as to whether or not to oppose a transfer. Clearly the employee can only do so if he or she knows all the relevant facts and is informed honestly.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): Under the Czech Labour Code, the transferor must inform those employees directly affected and consult with them about a planned transfer. If there is a trade union or works council within the transferor, they must also be informed and consulted. The same information and consultation procedure should be undertaken by the transferee in relation to any employees directly affected by the transfer.

However, under Czech law, a breach of these information and consultation duties does not have such serious consequences. First of all, employees cannot oppose a transfer. Secondly, a breach would not cause the invalidity of the transfer itself. Thirdly, the transferor and/or transferee could only be penalised by the State Labour Inspection Office where such information and consultation duties were breached in respect of a trade union or works council**.** The fine could amount to up to approximately € 8,000 (CZK 200,000). Where no trade union or works council exists, no fine could be imposed.

On account of these facts, Czech employers very often breach their information and consultation duties in order for the transfer to take less time. Hopefully, the next amendment of the Labour Code and the Act on Labour Inspection will change this situation and employers will be more motivated to inform employees about the transfer fully, correctly and honestly.

Denmark: (Mariann Norrbom): Ordering Siemens to pay salary to the transferred employees one year after the actual transfer of its mobile phone division seems to be a result of very far-reaching implications. It is highly unlikely that a Danish court would reach the same conclusion in a similar case. In Denmark, Directive 2001/23 is implemented by the Danish Act on Employees' Rights on Transfer of Undertakings. If the transferor does not comply with the requirements of the Act to inform employees in connection with a business transfer, the consequence will in most cases be a fine, and not an award of the calibre that Siemens was faced with in this case.

France (Claire Toumieux and Susan Ekrami): Contrary to German law, French law has not transposed Article 7 of the European Directive of 12 March 2001, which stipulates a duty to inform and consult. In a recent decision dated 18 November 2009 (Cass. Soc no 08-43.397 commented in EELC 3-2010), the French Supreme Court held that Article 7 of the European Directive had no horizontal effect. Therefore, the employer was not bound by any duty to inform and consult and consequently the employees affected by the transfer could not bring a claim for compensation for not having been informed and consulted.

(Footnote)

1 The plaintiff only claimed this sum, but technically he was also entitled to salary as of 1 January 2007.

Subject: Transfer of undertaking – employee's right to oppose transfer
Parties: *Unknown plaintiff – v – Siemens AG* (defendant)
Court: *Bundesarbeitsgericht* (Federal Labour Court)
Date: 20 May 2010
Case number: 8 AZR 734/08
Hardcopy publication: NZA 2010, 1295
Internet publication: Not yet available

2011/5

Referral to ECJ for clarification of legality of national time-bar rules in relation to discriminatory exclusion from pension scheme

COUNTRY THE NETHERLANDS

CONTRIBUTOR PETER VAS NUNES, BARENTSKRANS, THE HAGUE

Summary

A pension scheme under which full-time employees were enrolled in the scheme automatically, compulsorily and from the first date of their employment, but part-time staff had to apply in order to participate in the scheme on a voluntary basis, may be sex-discriminatory, depending on how explicitly the part-timers were warned by their employer of the disadvantage of not participating. The ECJ's case law on the effectiveness of national time-bar rules is not clear, for which reason the ECJ will be asked for clarification.

Facts

This complicated case is about 19 (former) casual and part-time employees, all female (the "plaintiffs"), of the KBB group of department stores ("KBB"). A casual worker was defined in the relevant collective agreement as an employee who works for on average less than 12 hours per week or is employed for a fixed period not exceeding eight weeks. A part-time worker was defined as an employee with a contract exceeding eight weeks and with an average work week of more than 12 hours but less than 40 hours. Until 1992, KBB's pension scheme was not fully open to all casual and part-time workers in the same way as it was open to regular full-time employees, who participated in the scheme automatically from the first day of their employment. The exclusion of casual and part-time workers from the pension scheme was relaxed in three steps:

- until 1978 all casual and part-time workers were fully excluded;
- from 1978 to 1985 casual workers continued to be fully excluded, but part-timers participated in the scheme (i) after five years of service or (ii) sooner in the event they applied for voluntary participation;
- from 1986 to 1991 casual workers still continued to be fully excluded, but for part-timers the five-year period was reduced to one year;
- as of 1992, all staff, including casual workers and part-timers, participated automatically from their first day of employment and there was no longer any distinction between them and the regular full-timers.

In 1990 the ECJ delivered its highly publicised judgment in the *Barber* case[1]. The *Barber* judgment was followed by a number of other ECJ rulings, including the 1994 rulings in the *Vroege* and *Fisscher* cases[2]. These and other rulings created awareness that the exclusion of casual and part-time workers from pension schemes, where those workers were predominantly female, can be in violation of what was then Article 119 of the EC Treaty (later Article 141) and what is now Article 157 of the TFEU. At a certain point in time[3], the union of which the plaintiffs were members informed them that KBB had discriminated against them on the basis of their gender and that they could make a claim. How and when the plaintiffs demanded redress is not known. All we know from the published judgments in this case is that on 9 October 2001, they brought a case before the Lower Court of Amsterdam, against KBB as well as its pension fund. They asked the court to (i) order KBB to enrol them retroactively in the pension scheme or (ii) award them compensation for lost accrual of pension rights.

KBB's defence consisted mainly of two arguments. First, they disputed that they had discriminated. They argued that giving an employee the option to either participate in a pension scheme or not is not less favourable but, on the contrary, more favourable than giving no choice and simply having him or her participate compulsorily, whether he or she likes it or not. In the second place, KBB invoked Article 3:310(1) of the Dutch Civil Code, which provides that a claim for a tort or breach of contract becomes time-barred five years after the date on which a claimant knows (i) that here has been a tort or breach of contract against him or her and (ii) who is liable for it[4].

The court of first instance awarded only a small portion of the alternative claim. Both parties appealed to the Amsterdam Court of Appeal. It ruled, *inter alia*, (i) that KBB had discriminated indirectly and without justification on the basis of gender, (ii) that this discrimination existed not only in the period before 1978, but during the entire period up to 1992, (iii) that KBB's *"Barber"* defence (no retroactivity beyond 17 May 1990) failed and (iv) that the time-bar period did not commence until the plaintiffs had been informed by their union of their rights under ECJ case law.

Part (i) of the ruling, inasmuch as it related to the period in which part-timers could enrol in the pension scheme on a voluntary basis, was based on the reasoning that the plaintiffs were all either young and/or married women and that their situation was not comparable to that of their full-time colleagues. Whereas those colleagues were automatically enrolled in the pension scheme (they did not need to take any action), the plaintiffs needed to take individual initiative in order to enrol. This entailed the risk that they might not apply for enrolment on account of ignorance of their rights, inexperience, forgetfulness or carelessness. This risk was borne out by the fact that only a small percentage of the part-timers who were eligible to apply for voluntary enrolment actually did so.

Supreme Court judgment 2007

By this time, KBB had accepted that it had discriminated in respect of the casual workers before 1992 and in respect of the part-time workers before 1978. Thus, the Supreme Court case was limited to the part-timers in the period from 1978 to 1992, during which time they were not enrolled in the pension scheme automatically from their first day of employment, but could enrol voluntarily during their initial five years or one year of employment.

The Supreme Court found as follows[5]:

1. The mere fact that the plaintiffs, contrary to their full-time colleagues, needed to take action in order to enrol in the pension scheme, did not constitute such an impediment that it amounted to *de facto* exclusion from the scheme as prohibited by (the ECJ's case law on) Article 119 of the EC Treaty.
2. The Court of Appeal was in error by holding that the time-bar period did not commence until the plaintiffs had been informed by their union of their rights under ECJ case law. The period commenced when they became aware that KBB had treated them

differently as compared to their full-time colleagues and were therefore realistically capable of claiming compensation, even if they were unaware of the legal merits of the situation. The case was remanded to the Court of Appeal of The Hague to determine when this was.

Before continuing, two points should be noted. The first is, that Dutch case law holds that if an individual is unaware of his or her right because of a circumstance for which the other party to the relevant contract bears responsibility, the time-bar in respect of that right does not commence as long as that circumstance remains in effect. The second point to note is, the Supreme Court did not (need to) address a question that was raised in the proceedings, namely whether KBB could invoke the time-bar rules against the plaintiffs, that would influence only their entitlement to pension payments already due or also the period of accrual of rights to future payments. This issue was left open.

Judgment 7 December 2010

The Court of Appeal of The Hague needed to decide on an argument that the plaintiffs had raised but that the Court of Appeal of Amsterdam had left undecided, namely that KBB had failed to comply with its duty to inform its part-time staff adequately of their right to apply for voluntary participation in the company's pension scheme. All KBB had done was to provide collective information in staff meetings, by way of a brochure and through an inconspicuous notice in its in-house magazine, none of which contained a very explicit warning that failure to apply for voluntary participation would harm their interests. For this reason, the court found that KBB had discriminated against the plaintiffs on the grounds of gender within the meaning of Article 119 of the EC Treaty.

As for the time-bar issue, the court observed that the ECJ's case law on this issue is not clear and that it is therefore necessary to refer questions to the ECJ for a preliminary ruling. However, before doing so, the court asked the parties to express their views on certain points of domestic law.

Commentary

The Advocate-General with the Dutch Supreme Court, *inter alia*, gave a historical overview of the ECJ's case law regarding gender-discriminatory pension schemes. One of the reasons he did this was to investigate whether the Dutch law on time-barring claims is compatible with EU law, which he concluded it is. The overview, which some readers may find useful, can be summarised briefly as follows:

- ECJ 8 April 1976 case 43/75 (*Defrenne II*): Article 119 of the EC Treaty has horizontal direct effect, but rights based thereon lack retroactive effect beyond 8 April 1976;
- ECJ 31 March 1981 case 96/80 (*Jenkins*): treating part-timers less favourably than full-timers, where the part-timers are relatively more often female, constitutes discrimination within the meaning of Article 119;
- ECJ 13 May 1986 case 170/84 (*Bilka*): payments under a contractual (i.e. not State) pension scheme constitute a benefit from employer to employee within the meaning of Article 119;
- ECJ 17 May 1990 case 262/88 (*Barber*): a pension scheme that starts paying out to women at an earlier age than to men is in breach of Article 119 (even if this advantage is offset by other advantages for men). However, the discriminated group cannot claim the same benefits as the dominant group retroactively in respect of periods of service predating 17 May 1990, because the Member States, employers and pension funds understandably relied on Directives 79/7 and 86/378 (now Directive 2006/54), allowing different retirement ages for men and women;
- ECJ 6 October 1993 case C-109/91 (*Ten Oever*) (as confirmed in the "Barber Protocol"[6]): *Barber*-type claims can relate only to periods of work performed from 17 May 1990, not to earlier periods, even if the retirement date is after 17 May 1990;
- ECJ 28 September 1994 cases C-57/93 and C-128/93 (*Vroege* and *Fisscher*):
  a. it follows from *Bilka* that the right to participate in a pension scheme is covered by Article 119 and is therefore not limited to the period from 17 May 1990 (but it cannot go back further than 8 April 1976);
  b. the Barber Protocol does not stand in the way of that right, because it relates to **accrual** of pension, which is not the same as the right to **participate**;
  c. not only employers must comply with Article 119 of the EC Treaty, pension funds can also be held directly liable for non-compliance;
  d. employees who demand retroactive participation in a pension scheme must pay the contributions they saved by not participating, if any *[Note: To my knowledge, the ECJ has not yet ruled on whether such employees may need to pay contributions with interest and with compensation for improved life-expectancy and, if so, how this interest and this compensation are to be calculated]*;
  e. national time-bar rules can be applied provided (i) they are not stricter than the rules applying to other similar types of claim and (ii) they do not make it practically impossible to exercise one's right to (retroactive) participation;
- ECJ 24 October 1996 case C-435/93 (*Dietz*): the limitation in retroactivity following *Barber* does not apply to benefits that result (indirectly) from discrimination in respect of the right to participate in a pension scheme;
- ECJ 11 December 1997 case C-246/96 (*Magorrian* and *Cunningham*): in the event that a person has been denied the right to participate in a pension scheme in a manner that is gender-discriminatory, all years of service from 8 April 1976 count towards calculating the amount of the benefits, i.e. time-bar rules can relate to pension payments, but not to pension accrual;
- ECJ 16 May 2000 case C-78/98 (*Preston*): however, a national rule barring claims for pension, if asserted longer than six months after employment has terminated, is valid.

I confess to finding the ECJ's case law on national time-bar rules in relation to pension discrimination claims difficult to grasp.

Comments from other jurisdictions

United Kingdom (Julian Parry): As mentioned by Peter Vas Nunes in his commentary, the case law on claims by part-timers for historical occupational pension scheme benefits is a complex maze and it is unsurprising that the Dutch court decided to make another reference to the ECJ for clarification. The case serves as an uncomfortable reminder that issues of this nature may not surface until many years after discriminatory provisions have disappeared from a pension scheme, when information or documentation issued by the employer from the relevant time may be long lost.

Had the employees been working in the UK, they would very probably also have succeeded in their claims of indirect sex discrimination. The Equality Act 2010 now expressly applies a non-discrimination rule to all

occupational pension schemes (s.61), although it is substantively the same as the previous legislation, which that Act replaced. There may also have been a potential claim for less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2002. Note that, in cases where employment has ended, UK law requires a pension equality claim to be brought within six months of the date of termination.

In the event of a successful claim, following the ruling of the House of Lords in *Preston v Wolverhampton Healthcare NHS Trust* [2001] IRLR 237, the most likely outcome is that membership of the scheme would be backdated to the later of 8 April 1976 (the date of the *Defrenne no 2* judgment) or the date the employment started. However, it is quite possible that on similar facts, a UK court would have decided to refer the matter to the ECJ in light of the confused state of the law.

[Footnotes]

1 ECJ 17 May 2990 case 262/88 (*Barber*).
2 ECJ 28 September 1994 cases C-57/93 (*Vroege*) and C-128/93 (*Fisscher*).
3 The judgments referred to in this case report are not precise on the date.
4 Before 1994 the time-bar rules were different. Since that time, there are two time-bar rules: the 5-year period referred to above and a period of 20 or 30 years from the date of the tort or breach of contract, regardless of whether the claimant knew about it (with rare exceptions in case law, e.g. in asbestos cases). A claimant can stop the time-bar period from running by serving a written notice on the other party, as the plaintiffs in this case said they had done. In that case, a new period of five years starts running.
5 Supreme Court 5 January 2007, «JAR» 2007/50.
6 OJ 29 July 1992 C191 page 68.

Subject: Sex discrimination – national time-bar rule
Parties: *Mrs Boersma – v – Magazijn De Bijenkorf* et al.
Court: *Gerechtshof 's-Gravenhage* (Court of Appeal of The Hague)
Date: 7 December 2010
Case number: 105.006.717
Hardcopy publication: «JAR» 2011/39
Internet publication:www.rechtspraak.nl ➪ LJ Number BO 6512

2011/6

Loss caused by ex-employer's victimisation not too remote

COUNTRY UNITED KINGDOM

CONTRIBUTOR BETHAN CARNEY, LEWIS SILKIN, LONDON

Summary
A law firm that victimised a former employee by giving her a bad reference, because she had brought a sex discrimination claim against it, was liable to pay her compensation for loss of earnings when a prospective new employer withdrew a job offer because of the reference.

Facts
Ms Bullimore, a solicitor, brought claims of unfair dismissal and sex discrimination following the termination of her employment with a law firm (WW). These proceedings were eventually settled.
A few years later, she was offered employment with another firm, Sebastians. She gave her former firm WW as one of the referees. Accordingly, Sebastians asked WW to send them a reference letter. WW complied and sent Sebastians a written reference. In answer to a question about how her employment had ended, the reference referred gratuitously to the fact that Ms Bullimore had brought tribunal proceedings and also said that *"she could on occasion be inflexible as to her opinions"*.
As a result, Sebastians changed its offer of employment to make it conditional on a satisfactory probationary period. Ms Bullimore thought that this was an unjustifiable attempt to alter the terms of the offer and she refused to proceed. Sebastians refused to drop its requirement for a probationary period and the offer lapsed, effectively having been withdrawn. Ms Bullimore then brought a claim of victimisation against both her former employer WW (now called PWW) and her prospective employer Sebastians.
The Employment Tribunal upheld her claim. It found that (i) the terms of the reference by WW and (ii) the withdrawal of the job offer by Sebastians were both acts of unlawful discrimination by way of victimisation, contrary to the Sex Discrimination Act 1975 ("SDA"). The reference was unlawful because its unnecessarily negative content was influenced by the fact that Ms Bullimore had brought a sex discrimination claim. The withdrawal of the offer of employment was unlawful because Sebastians were not simply responding to a negative reference, but were influenced in their decision to withdraw their offer by the fact that Ms Bullimore had brought sex discrimination proceedings against her former employer. In both instances, the relevant statutory provision was s4 of the SDA. This section provided protection for (former) employees against less favourable treatment by reason of having done certain so-called "protected acts" – for example, bringing proceedings under the SDA or alleging that someone had contravened the SDA. (**Note:** With effect from October 2010, this provision was repealed and replaced by a similar anti-victimisation rule set out in s27 of the Equality Act, which applies to sex and the various other protected characteristics covered by that Act, such as race, age and disability.)
The Tribunal's decision was subsequently affirmed by the Employment Appeal Tribunal ("EAT") ([2010] IRLR 572).
In the UK, cases such as this usually go through two stages. The first is to determine whether the respondent is liable. The second stage consists of a "remedies hearing", the purpose of which is to determine the amount of the liability. In this case, where Ms Bullimore had sued both PWW and Sebastians, the remedies hearing would normally have included both respondents. However, Ms Bullimore agreed a settlement with Sebastians, which paid her £ 42,500. The result was that the sole purpose of the remedies hearing was now to determine how much compensation PWW should pay. On this question, the Tribunal found that the reason Ms Bullimore had lost the job was the withdrawal of the offer, which was an unlawful act of Sebastians. Being a law firm, it must have been aware that it was doing wrong. The withdrawal constituted a new act which "broke the chain of causation" so as to make Ms Bullimore's loss of earnings too remote to justify compensation from PWW. Accordingly, the Employment Tribunal concluded that PWW could not be found liable for the loss of earnings flowing from the withdrawal of the job offer by Sebastians. It limited the award of compensation from PWW to £ 7,500 for injury to feelings.
Ms Bullimore appealed to the EAT on the question of remedies.

The Employment Appeal Tribunal's decision

Upholding the appeal, the EAT held that the withdrawal of the job offer and the consequent loss of earnings were far from being too remote to justify compensation from the previous employer. Ms Bullimore had suffered loss as a result of the combination of two unlawful acts and the withdrawal of the job offer was a direct, natural and foreseeable consequence of the supply of the reference. There was no rule that a subsequent unlawful act by a different party automatically "broke the chain of causation".

The EAT also pointed out that giving damaging references is not an uncommon form of victimisation and it would be very unsatisfactory if a claimant who lost a job as a result of such a reference was unable to recover damages from the person who gave it. This was particularly so because a remedy against the prospective employer would not always be available – if, for example, the prospective employer had no idea that the claimant had brought discrimination proceedings, but withdrew its offer simply on the basis of a bad reference.

Accordingly, the EAT ruled that the previous employer should be liable for the loss of earnings and the case was remitted to the Employment Tribunal for consideration of the amount.

Commentary

It is important to note that, in this type of case, both the prospective employer and the former employers can be held liable for loss of earnings, as well as injury to feelings, flowing from their unlawful acts of sex discrimination by victimisation. The former employer can be liable for the former employee's loss of earnings, even if the conduct by the prospective employer is also considered to be unlawful victimisation. However, the prospective employer will only be liable if its decision to withdraw the job offer was motivated by a reference that directly referred to a "protected act".

The EAT set out its provisional views about how liability for damages should be divided between the employers in this type of situation. In this particular case, the parties had proceeded on the basis that the liability for loss of earnings would be apportioned between the two respondents, i.e. that each would only be liable for a part, and the EAT decided not to interfere with that agreement. However, the EAT did comment that apportionment was probably inappropriate, because the loss of earnings appeared to be an "indivisible injury". On that basis, each party should be jointly and severally liable for the full amount.

What are employers to take from the case? The EAT acknowledged that *'the Tribunal's conclusion might, without reference to the detailed facts, seem rather harsh: the position of employers who are asked for references for employees with whom they have fallen out is a delicate one'*. One practical lesson from this case for employers is never to refer to a former employee's discrimination claim in a reference. As for prospective employers, they should be very careful if they are provided with such a reference and, if the job offer is withdrawn, must be able to prove that the decision was not motivated by the information about the claim.

Finally, although this case was brought under the old SDA victimisation provisions that have now been superseded, the EAT's conclusions will continue to be relevant to victimisation claims of this nature under the Equality Act 2010.

Comments from other Jurisdictions

The Netherlands (Peter Vas Nunes): Employer 1 provides prospective Employer 2 with a negative reference that qualifies as sex discrimination. As a result, prospective Employer 2 withdraws its offer of employment. Both employers act in breach of the anti-discrimination law. Is each of them singly liable for the loss resulting from its own behaviour, or are both employers jointly liable? It probably makes no difference, but let us suppose that both employers are jointly liable for the (former respectively prospective) employee's loss of earnings and for the injury to her feelings. In this case, Ms Bullimore had already received £ 42,500. A Dutch court would most likely deduct this amount from the award.

Subject: Sex discrimination; victimisation
Parties: *Bullimore – v – (1) Pothecary Witham Weld Solicitors and another (No. 2)*
Court: Employment Appeal Tribunal (England & Wales)
Date: 21 September 2010
Case number: UKEAT/0189/10
Hardcopy publication: [2011] IRLR 18
Internet publication: www.employmentappeals.gov.uk

2011/7

Discriminatory termination in probationary period can lead to claims for damages

COUNTRY GERMANY

CONTRIBUTOR PAUL SCHREINER, LUTHER RECHTSANWALTSGESELLSCHAFT, ESSEN

Summary

Although the German Law on Dismissal Protection does not apply during an employee's initial probationary period, this does not prevent an employee whose employment has been terminated during this period from bringing a claim for damages as a result of discrimination.

Facts

This case concerns a German plaintiff who spoke with a Russian accent. She completed a six-week internship with the defendant, a logistics company. Upon completion of her internship she was issued with a positive reference. On 20 January 2009, directly following her internship, she was hired by the same company as an administrative clerk. Her contract included a clause stipulating that the initial six months of her employment would be a probationary period (six months being the maximum possible length under German law).

On 11 March 2009, the company's managing director told the plaintiff that the company could not afford to employ staff who speak with an accent, because customers might think, *"what an awful shop, they hire only foreigners"*. Following this conversation, the plaintiff got no more work, was denied the use of the telephone and on 7 April 2009, her employment was terminated with two weeks' notice. Shortly afterwards, the defendant advertised a vacancy, starting on 1 May 2009.

On 15 April 2009, the plaintiff made a request to the defendant to pay her € 5,400 (the equivalent of three months' salary) in damages, pursuant to the German Anti-Discrimination Act (*"Allgemeines Gleichbehandlungsgesetz"*, the *"AGG"*). The defendant rejected this

demand, whereupon, on 19 May 2009, the plaintiff brought an action before the local court in Bremerhaven, claiming € 5,400. The court awarded the claim despite the defendant's assertion that it had terminated the employment contract for operational reasons during a probationary period, which is perfectly legitimate under German law. The defendant lodged an appeal with the appellate court in Bremen.

Judgment

The defendant's first argument was based on Article 15(4) of the AGG, which provides that a person who feels discriminated against and wishes to bring a claim, must give notice of his or her intention to do so within two months of the date on which he or she became aware of the discrimination. The court held that this date was 7 April 2009, the date on which the plaintiff was given notice of termination and that, therefore, she had given notice of her intention to bring a claim in time.

The defendant argued that the notice given by the plaintiff only related to material harm, pursuant to Article 15(1) of the AGG, not to compensation for immaterial harm, pursuant to Article 15(2) of the AGG. The court held that in principle both claims are in relation to harm, either material or immaterial.

Secondly, and more importantly, the defendant relied on Article 2(4) of the AGG. This provision, the meaning of which is much debated, reads, "*Für Kündigungen gelten ausschliesslich die Bestimmungen zum allgemeinen und besonderen Kündigungsschutz*". This translates as, "In respect of terminations, the general and specific rules relating to dismissal protection apply exclusively". The defendant, in line with certain scholars and judicial precedent, read this as meaning that a claim in respect of the termination of an employment agreement can be based exclusively on the "*Kündigungsschutzgesetz*", which is the Law on Dismissal Protection. Since the "*Kündigungsschutzgesetz*" does not contain a provision granting damages for a discriminatory notice of termination, the defendant argued that the plaintiff had no such claim. The Court of Appeal rejected this argument, reasoning as follows.

First, Article 2(4) of the AGG deals with the validity of the termination and it prevents a discriminatory termination from being valid. It does not, however, bar a claim for monetary compensation based on the violation of a person's "*Persönlichkeitsrecht*". This is a concept, codified in Article 823(1)(o) of the Civil Code, which covers, *inter alia*, an individual's right to privacy and non-discrimination.

Secondly, the defendant's reading of Article 2(4) of the AGG would lead to the illogical result of rendering Article 2(1)(2) of the AGG meaningless. This provision holds that any unequal treatment ("*Benachteiligung*") in respect of conditions of termination ("*Entlassungs-bedingungen*") is unlawful. The defendant's interpretation of the law would lead to inconsistency between two provisions of the same statute.

Thirdly, there was the fact that prior to 2006, when the AGG did not yet exist, the highest German labour court dealing with employment matters ("*Bundesarbeitsgericht*", the "BAG") had repeatedly awarded claims for immaterial harm based on the violation of the principle of "*Persönlichkeitsrecht*" in cases of discrimination. Given that Article 15(2) of the AGG allows victims of discrimination to bring a claim for immaterial harm, the same should still hold true for violation of the AGG.

Having established that the plaintiff's claim was valid, the Court of Appeal went on to examine whether the defendant had in fact discriminated against her. The court began by noting that Article 22 of the AGG shifts the burden of proof to the defendant, if the plaintiff makes a *prima facie* case of discrimination. In light of this, the statement made by the defendant's director (which had been evidenced by witnesses) that the defendant could not afford to employ staff who speak with an accent, clearly referred to the plaintiff's Russian origin and therefore constituted direct ethnic discrimination. The fact that the defendant had issued the plaintiff with a positively worded reference upon completion of her internship made it clear that the director's remark about her accent did not reflect on her ability to make herself clear to customers, but rather to her ethnic origin. Therefore, although the reason given for the dismissal was not the plaintiff's accent, but "operational reasons", the termination, coming less than one month after the discriminatory remark, was presumptively discriminatory.

The defendant was not able to refute this presumption. Although it is true that German law permits a probationary dismissal for any reason, the fact that the defendant had advertised a vacancy for the plaintiff's position as of 1 May 2009, proved that the reason the defendant gave in court, namely "operational reasons", was false.

Finally, the court addressed the extent of the compensation. It found the defendant's behaviour to be very serious, and accordingly, awarded the plaintiff compensation for immaterial harm in the amount of three months' salary (the maximum compensation allowed under Article 15(2)(2) of the AGG). Admittedly, this provision deals with a different situation (namely, where a job applicant is turned down for a discriminatory reason, but would not have got the job irrespective of the discrimination), but the plaintiff had only demanded this specific sum, which hindered the court from awarding her a larger amount.

Commentary

This case is presently under review by the BAG, which has agreed to review it because the issue of whether Article 2(4) of the AGG bars claims for compensation, particularly in a case of discriminatory termination, has yet to be settled. I am confident that the BAG will uphold the judgment reported above. A BAG judgment in another case regarding Article 15(2) of the AGG, delivered on 22 October 2009, supports my view.

In my opinion, the judgment reported above is dogmatically correct and in line with Directive 2000/78, which the AGG transposed into German law.

Although the court in this case limited the compensation it awarded to three months' salary, it did not rule that this was the highest possible award in a case like this. I do not rule out the possibility of higher awards being made in the future.

Because of the burden of proof rule under the AGG, I doubt whether the defendant would have done any better if its managing director had not lied about the reason for terminating the plaintiff's employment. It was clearly evidenced that the director had made the statement relating to ethnic origin. If an employee can prove such allegations, an employer needs to react to this by showing the reasons for the termination, otherwise a court cannot ignore the facts put forward by the employee.

Comments from other jurisdictions

Finland (Karoliina Koistila): As a general rule, probationary periods in Finland do not exceed four months. While it is possible for an employer to terminate an employment relationship with immediate effect during the probationary period, this termination must not breach

the prohibition of discrimination (e.g. based on nationality or ethnic origin) and the employer's duty to treat employees fairly. Likewise, the termination should not take place on account of other inappropriate reasons.

In the case in question, it is possible that the plaintiff might have successfully brought a claim against the defendant for both discrimination and unlawful termination. On the other hand, it is generally difficult for an employee to challenge a termination that occurs during the probationary period, because the criteria for permitting termination in the probationary period are less strict than for termination during regular (post-probationary) employment.

It is worth noting that, under Finnish law, if the work performed by the employee as a trainee and a clerk was similar and had an equivalent level of responsibility, a Finnish court may have held that the employer was not permitted to use a probationary period at all when rehiring him or her.

Under Finnish law, the purpose of the probationary period is purely for the employer to evaluate whether the employee in question is suitable to do the work. Therefore, when rehiring a former employee, a decision would be taken based on how much time has passed since the former employment relationship ended, whether the nature of the tasks is different, or whether the employee's professional skills may have deteriorated. If the court considers that the internship gave the employer a sufficient chance to determine whether the employee was suitable to do the work, it may find that the probationary period was unjustified.

United Kingdom (Lorna Scamman): The finding in this case broadly matches the position in the UK, where employees who have at least one year's continuous service have the right not to be unfairly dismissed. For a dismissal to be fair, the employer must show that it had valid grounds for the dismissal and that it acted reasonably in dismissing the employee. Given that probationary periods tend to be significantly shorter than 12 months, employees dismissed during or at the end of their probationary period will typically have no right to argue that the dismissal was unfair.

Employees also have the right not to be discriminated against because of a protected characteristic, but there is no qualifying period of service for this right and it applies even before employment begins. Therefore, where a dismissal is found to be tainted by discrimination, the employee can lodge a complaint in the employment tribunal regardless of their length of service. The UK Government is currently proposing to increase the qualifying period of service for unfair dismissal to two years. If this proposal goes ahead, we are likely to see an increase in the number of discrimination claims that are brought during the first two years of employment.

Subject: Sex discrimination (termination)
Parties: *Unknown plaintiff – v – unknown defendant*
Court: *Landesarbeitsgericht* (Labour Court of Appeal) Bremen
Date: 29 June 2010
Case number: 1 Sa 29/10
Hardcopy publication: NZA-RR 2010, 510-514
Internet publication:
www.landesarbeitsgericht.bremen.de ➪ Entscheidungen

EELC 2011/8

Cost is not a factor justifying different treatment of fixed-term employees with respect to redundancy package

COUNTRY IRELAND

CONTRIBUTOR GEORGINA KABEMBA, MATHESON ORMSBY PRENTICE, SOLICITORS

Summary
The Labour Court was initially required to determine whether an employee with a fixed-term contract should be deemed permanent. It was deemed that she was not entitled to a contract of indefinite duration. In a subsequent case, the Labour Court was required to consider, *inter alia*, whether this now former fixed-term employee was entitled to the same redundancy package offered to permanent staff of the employing University. The Court believed that the University was not objectively justified in its difference in treatment between the former employee and her comparators, and awarded her a redundancy payment comparable to permanent employees.

Facts
The matter between Dr Buckley and National University Maynooth ("NUIM") involved a series of cases before the Rights Commissioner, the Labour Court and the High Court concerning her employment with NUIM and her equal treatment as a fixed-term employee. We will focus on the two main cases, both of which originated before the Rights Commissioner[1] and were appealed to the Labour Court.

Dr Buckley commenced employment with NUIM on 1 October 2003. She was engaged in a research project concerning medieval Irish music, wholly funded by a State-run body providing grants. She was provided with a fixed-term contract contingent on specific funding from the State body. The contract ran from 1 October 2003 to 30 September 2006 (a three-year term). Dr Buckley applied for and received another grant near the completion of her research. A further fixed-term contract was issued, which ran from 1 October 2006 to 30 September 2008 (a two-year term).

Facts: Case 1
In Dr Buckley's first complaint to the Rights Commissioner, she claimed that the circumstances of the renewal of the first contract were in breach of s9 of the Protection of Employees (Fixed-Term Work) Act 2003[2]. She claimed that her employer had failed to notify her in writing and in time of the objective justification for renewing her contract for a fixed term rather than for an indefinite term. NUIM claimed that Dr Buckley had signed a contract agreeing to objective reasons for its renewal on a fixed-term basis. The Rights Commissioner found in Dr Buckley's favour in August 2008 and declared that she should have received a contract of indefinite duration. This meant that she should then have had a permanent contract beyond the expiry date of 30 September 2008. NUIM appealed this decision to the Labour Court on the basis that it had justifiable grounds not to give Dr Buckley a permanent contract and that she had signed up to and agreed to this when she signed the second contract.

Whilst awaiting the Labour Court appeal hearing[3], NUIM served redundancy notice on Dr Buckley in August 2008, because of the pending expiration of the fixed-term contract in September 2008. NUIM claimed that it had no further work for her. Following representations by Dr Buckley's union representative, NUIM placed Dr Buckley on "administrative leave" and agreed to continue paying a salary to her until the outcome of the Labour Court hearing. NUIM claimed that this was done as a gesture of goodwill.

In November 2008, with the appeal still pending, NUIM offered Dr Buckley a redundancy lump sum in an amount equivalent to four weeks' pay per year of service, plus her statutory entitlements. The offer was expressed as being made on a "without prejudice basis"[4], in return for a full waiver of outstanding and potential future claims against NUIM, including her claim that had been adjudicated upon by the Rights Commissioner and was still under appeal. It was also proposed that the amount payable under this formula would be abated by the amount of salary that she had received (as a goodwill gesture) since 30 September 2008. Dr Buckley refused this offer and in December 2008, NUIM notified her and her union that it intended to discontinue paying her salary[5]. NUIM ceased paying her salary on 12 January 2009.

Judgment: Case 1

On 24 February 2009, the Labour Court issued its determination in NUIM's appeal against the decision of the Rights Commissioner in Dr Buckley's complaint under the Protection of Employees (Fixed-Term Work) Act 2003. The Court held that Dr Buckley did not have an entitlement to a contract of indefinite duration, as she had signed a binding contract agreeing to its renewal on a fixed-term basis and could not subsequently alter this. The determination of the Labour Court was not appealed[6].

Facts: Case 2

However, in April 2009, Dr Buckley presented a new complaint to the Rights Commissioner, alleging that she had been treated less favourably in terms of her conditions of employment comparable to that of a permanent employee. She claimed, *inter alia*, a redundancy lump sum equal to four weeks' pay per year of service, plus statutory redundancy terms comparable to permanent catering staff employed by NUIM who had recently been made redundant.

Under the Redundancy Payments Acts 1967 to 2007, employees aged 16 and over with more than two years' service are entitled to a statutory payment of two weeks per year of service, plus one 'bonus' week. Therefore, fixed-term employees with more than two years' service are legally entitled to the statutory payment. The weekly statutory rate is currently capped at € 600 per week. With statutory entitlements only, Dr Buckley would receive (5 x 2) + 1 = 11 weeks' pay. Under the redundancy package recently offered by NUIM to permanent catering staff, she would receive the 11 weeks' statutory pay, plus a further 20 weeks' pay with no cap on the weekly rate. The Rights Commissioner directed NUIM to pay Dr Buckley such a sum based on this formula.

NUIM appealed the Rights Commissioner's award, denying that Dr Buckley was entitled to the redundancy lump sum claimed. Firstly, it submitted that she was not treated less favourably than her nominated comparator, given that she had been offered and had declined the same redundancy settlement as her comparator. NUIM further submitted that the catering assistants became redundant in circumstances in which their working premises were destroyed in a fire. Therefore, the circumstances in which these employees became redundant were sudden and unexpected. In contrast, Dr Buckley was employed to undertake research that was to be externally funded. NUIM believed that she was well aware at all times that the funding would come to an end with the inevitable loss of her employment. In these circumstances, NUIM submitted that the difference in treatment between Dr Buckley and the comparators was objectively justified. It also submitted that if Dr Buckley was entitled to an ex-gratia lump sum claimed (which was denied), then it was entitled to set off the amount that she received by way of salary given to her between 30 September 2008 and 12 January 2009, when NUIM had continued to pay her as a goodwill gesture awaiting the appeal. These salary payments were not insignificant and amounted to over € 22,000. Dr Buckley reaffirmed that there were no objective grounds justifying the difference in treatment by her employer.

Judgment: Case 2

In its determination the Labour Court focused on ss5, 6, and 7 of the Protection of Employees (Fixed-Term Work) Act 2003[7], outlining that the combined effect of the statutory provisions is that a fixed-term employee is entitled to be treated no less favourably in respect of his or her conditions of employment than a comparable permanent employee, unless the difference in treatment is justified on objective grounds. The Court outlined that the Act expressly provides that conditions of employment include conditions as to remuneration[8], with the Court affirming that it is well settled that a redundancy payment constitutes remuneration as per recent case law[9].

The Labour Court outlined that what the comparators had received on being made redundant was an unqualified payment and compensation for the loss of their employment. In comparison, Dr Buckley was now seeking a redundancy package corresponding to that paid to the comparators, in accordance with her statutory right under s6 of the Act to equal treatment with a comparable permanent employee. The Court outlined that this was qualitatively different to what she was offered in November 2008 and, consequently, could not accept that her refusal to accept the terms of that settlement offer now barred her from pursuing her claim. Accepting that the comparators were engaged in like work within the meaning of s5(2)(c) of the Act, the Labour Court determined that Dr Buckley was entitled to be treated similarly on being made redundant, unless the difference in treatment could be objectively justified.

In its determination, the Labour Court referred to *Bilka-Kaufhaus GmbH – v – Weber Von Hartz* [10], which sets out a three-tier test by which a discriminatory action by an employer may be justified, namely: *the "measure must firstly meet a "real need" of the employer, secondly the measure must be "appropriate" to meet the objective which it pursues and, finally, the measure must be "necessary" to achieve that Directive"*. The Labour court outlined that the case law of the ECJ effectively equates reliance on objective justification of a discriminatory practice with a derogation from the obligation to apply the principle of equal treatment. The Labour Court also referred to the ECJ's judgment in *Lommers*[11], which states that *"according to settled case law . . . due regard must be had to the principal of proportionality, which requires that derogation must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principal of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued"*.

The Labour Court outlined that in order to make out the defence, NUIM needed to identify the legitimate aim upon which it relied and show the

less favourable treatment as an appropriate means of achieving this aim. This then raised the question of proportionality and NUIM would have to prove that the less favourable treatment was necessary in order to achieve the legitimate aim. This meant that NUIM would have to establish that there were no alternative means with a less discriminatory effect, by which the aim could be achieved. The Labour Court determined that, in this case, NUIM sought to justify the less favourable treatment complained of by reference to the different circumstances in which Dr Buckley and the comparators came to be redundant.

The Labour Court determined that while the circumstances giving rise to redundancy in both cases were undoubtedly different, NUIM had not identified how those differences could be legitimately justified. It deemed that withholding the redundancy payment from Dr Buckley was neither appropriate nor necessary. The Court also outlined that while it may be said that NUIM was entitled to look at minimising expenditure, recent case law[12] made it clear that the cost associated with applying the principal of equal treatment can never provide objective grounds for maintaining unequal treatment. The Labour Court outlined that the suggestion by NUIM that the unequal treatment complained of was justified by the fact that the comparators were permanent employees with expectations of continuing employment that came suddenly to an end, whereas Dr Buckley was a temporary employee and could not have had such an expectation, was based on her status as a fixed-term employee and, therefore, was expressly precluded by the 2003 Act[13].

On this basis the Labour Court was satisfied that NUIM had failed to make out a defence of objective justification for the impugned difference in treatment between Dr Buckley and her comparators. As a result, the Court upheld the Rights Commissioner's Decision and awarded her the redundancy package comparable to the permanent catering staff[14].

Commentary

The rights of fixed-term employees have been examined with increasing regularity before the Irish statutory employment bodies, such as the Rights Commissioner and Labour Court. Such claims have been particularly prevalent in public sector educational and health services institutions. This case illustrates a number of points concerning treatment of fixed-term employees and the mechanics of the employment bodies.

Funding has long been used, particularly by employers in the State sector, for objectively justifying the use of successive fixed-term contracts rather than converting fixed-term employees to permanent status. This is a fair and legitimate reason, particularly in underfunded sectors. The Labour Court believed that Dr Buckley's claim that she should be considered a permanent employee was a very weak one. This was clear in its decision in the first case[15]. However, the use of successive fixed-term contracts has been abused in Ireland and there have been numerous cases in areas such as the public health sector, with the Labour Court awarding high levels of compensation to employees, such as consultant doctors[16].

It is important to note that a fixed-term employee may be entitled to a statutory redundancy payment at the end of his or her fixed-term contract, if he or she has at least two years' service. Therefore, if the employer does not intend to renew the contract and the employee is not entitled to a permanent position based on length of service, then the employer will need to consider whether the employee is entitled to a statutory redundancy payment, or indeed some form of ex gratia payment comparable to permanent staff.

Although the judgment does not provide any new significant legal points, the case clearly highlights that costs will not be a factor when an employer is seeking to justify different treatment of fixed-term employees. At a time when public sector institutions' finances are being slashed and scrutinised, and there have been moratoriums on recruitment of permanent staff, fixed-term or temporary employees have been a "get out of jail free" card for resourcing gaps whilst not increasing permanent headcounts, or potentially paying fixed-term employees less than a permanent employee. This series of cases shows that whilst employers may be able to protect themselves against employees claiming indefinite contracts where objective grounds do exist, this will not preclude them from other rights and responsibilities to fixed-term employees in areas such as remuneration and redundancy payments.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany, the situation is a bit different from Ireland. Since the employer is not required to make redundancy payments, such a duty can only be established by an agreement between the employer and the works council or the trade union. The best example of such an agreement is a social plan in relation to a mass redundancy. The main parameter for the amount of redundancy payments to be made to the employees is the loss they suffer as a result of the termination of the employment. Therefore, it is necessary to compare the situation before and after termination. For fixed-term employees this usually results in them suffering only minor disadvantages, since their employment would have terminated at the end of the term of the agreement anyway. Therefore, where a social plan exists, the amount paid to employees on fixed-term employment contracts is typically rather low. Usually, the period for negotiating and concluding a compromise of interests and a social plan, plus the respective notice period for indefinite-term employees are rather long. This leads to the vast majority of fixed-term employment contracts expiring before the actual close of business. As a result, the fixed-term employees are not actually entitled to redundancy payments.

The decision in the first case is much more pertinent in relation to the law in Germany. In Germany, as in Ireland, it is possible to limit an employment agreement in respect of its terms, if it is funded by a State body. However, this is only possible if the tasks that need to be performed under the employment agreement are not permanent in nature. Therefore, in the situation at hand a plaintiff before a German court would need to argue that in reality he or she performs permanent duties, meaning that his or her employment needs to be considered as permanent. This is very often the case, since usually the employees of universities and other relevant bodies are asked not only to perform the services they were employed for, but also various other tasks. If the original task under the fixed-term employment agreement is not the main duty of the employee, there is no justification for a limitation in terms. In these circumstances, a German court would treat the employment as being of a permanent nature.

The Netherlands (Peter Vas Nunes): In The Netherlands, staff downsizing is routinely achieved in large part at the expense of fixed-term staff. In fact, an employer that applies for permits to dismiss permanent staff risks being denied those permits, if it has not decided to discontinue the contracts of its fixed-term employees in similar positions. Those fixed-term employees are then sent away empty-handed, getting no compensation from their employer at all, in stark contrast to their colleagues with permanent contracts, who are commonly offered severance compensation ranging between one

and two months' salary per year of service. I find this grossly unfair and, more relevantly, it may not be compatible with clause 4 of the Framework Agreement on Fixed-Term Work (Directive 1999/70).

United Kingdom (Hannah Vertigen): In the UK, a blanket exclusion of fixed-term employees from enhanced redundancy pay would be extremely difficult to justify and it is likely that Dr Buckley's claim for less favourable treatment by virtue of her fixed-term status would have been decided in the same way. In *Hart and others – v – Secretary of State for Education and Skills* (case no 2304973/2004, unreported), an employment tribunal ruled that the exclusion from an enhanced redundancy scheme of educational advisers working on fixed-term contracts, whose work was broadly similar to that of a permanent adviser, was not justified. The employer in *Hart* used the same argument as NUIM in its attempt to justify the difference in treatment, i.e. that the redundancy payments were to compensate employees for loss of their expected ongoing employment, which was not the case in respect of a fixed-term employee who had no such expectation. However, the tribunal similarly rejected this argument, concluding that the fixed-term employees were entitled to an equal redundancy benefit to the permanent adviser, if their contracts were not renewed on expiry.
As in Ireland, an employer in the UK would also need to justify the continued use of a fixed-term contract beyond four years' continuous service. Renewal of a fixed-term contract may be justified where the employer can show it is a necessary and proportionate means of achieving a legitimate aim.

(Footnotes)

1. Rights Commissioners are appointed by the Minister for Enterprise Trade and Innovation. They operate as part of the Labour Relations Commission and are independent in their functions. Rights Commissioners investigate disputes, grievances and claims that individuals or small groups of workers refer under Employment Legislation.
2. s9 of the 2003 Act pertains to successive fixed-term contracts. Where a fixed-term employee completes his or her third year of continuous employment with his or her employer, the fixed-term contract may be renewed by that employer on only one occasion for a fixed term of no longer than one year. The employee must be given a permanent contract. However, this is not a requirement where an employer can make "objective grounds" justifying a renewal of a contract on a fixed-term basis. And in theory, once there are justified grounds, any number of successive temporary contracts can be offered.
3. There can be a six- to 12-month waiting time for Labour Court hearings.
4. Definition: a reservation made on a statement or an offer that it is not an admission or cannot otherwise be used against the issuing party in future dealings or litigation with any determinative legal effect.
5. It should be noted, as an aside, that following the discontinuance of her salary, with the decision of the Labour Court appeal still pending, Dr Buckley took another set of legal proceedings against NUIM, this time to the High Court, seeking an interlocutory injunction restraining her dismissal and requiring, *inter alia*, NUIM to continue paying her salary. The High Court refused to grant the interlocutory injunction, stating that Dr Buckley failed to establish that she had a strong case that she was likely to succeed at a full trial of the action.
6. The decision of the Labour Court was not appealed either.
7. The 2003 Act is the transposition into Irish Law of Council Directive 1999/70 concerning the Framework Agreement on Fixed-Term Work.
8. s2(1).
9. *St. Catherine's College for Home Economics – v – Maloney & Moran* [2009] 20ELR143.
10. C-170/84 of the ECJ.
11. *Lommers – v – Minister van Landbouw, Natuurbeheer en Visserij* C-476/99.
12. *Catholic University School – v – Dooley*, unreported, High Court Dunne J. 20 July 2010.
13. Precluded specifically by s7(1): objective grounds for less favourable treatment.
14. Dr Buckley also received a compensatory award of € 2,500.
15. Evidence of Dr Buckley's weak claim was also demonstrated by the High Court refusing to grant her an injunction to stop NUIM paying her salary.
16. *Oshodi – v – Health Service Executive*, Labour Court FTD 0913/2009; *Dr. Abdel-Haq – v – Health Service Executive South*, Labour Court FTD 0919/2009.

Subject: Breach of Protection of Employees (Fixed-Term Work) Act 2003
Parties: *National University of Ireland Maynooth* – v – *Dr Ann Buckley*
Court: The Labour Court
Date: 15 November 2010
Determination Number: FTD 1015/2010 (Follow on from FTD092/2009)
Internet publication: www.labourcourt.ie.

2011/9

Collective agreement that sets minimum fee for self-employed workers violates anti-trust law

COUNTRY THE NETHERLANDS

CONTRIBUTOR PETER VAS NUNES, BARENTSKRANS, THE HAGUE

Summary
Agreements restricting competition are covered by the anti-trust rules under Article 81 of the EC Treaty (now Article 101 of the TFEU) unless they meet the requirement for the "social exception" rule, as formulated by the ECJ in its *Albany* case law. A collective agreement that fixes minimum fees for self-employed workers does not meet these requirements.

Facts
In 2006, VRS, which is an association of self-employed *"remplaçant"* musicians, entered into a collective agreement with two unions. A *"remplaçant"* is a self-employed musician who is hired for one or more concerts or rehearsals to replace an employee of an orchestra who is temporarily absent. Schedule 5 to the collective agreement provided that *"remplaçant"* musicians should be paid a certain minimum fee, namely the standard rate applying to employed musicians plus 16%.

When the Dutch anti-cartel authority, the *"Nma"*, became aware of this, it decided to investigate and it informed the parties to the collective agreement that the agreement was potentially unlawful. This led to premature termination of the collective agreement in November 2007 and to legal proceedings initiated by one of the unions involved (*"FNV Kunsten Informatie en Media"*) against the government. Essentially, the union asked the court to declare that a provision in a collective agreement requiring the employer to pay self-employed staff a certain minimum fee is covered by what is known as the "social exception" rule and therefore is exempt from national and EU anti-trust law.

The ECJ formulated the "social exception" rule in a series of judgments, including those in the cases of *Albany*[1], *Brentjes*[2], *Drijvende Bokken*[3], and *Van der Woude*[4]. According to this case law, an agreement limiting competition is excluded from the scope of Article 81(1) of the EC Treaty if:

a. the agreement forms part of a collective agreement concluded between one or more organisations of employers and employees; and
b. it contributes directly to improving the employees' terms of employment.

In its defence, the government argued that neither of these conditions had been satisfied, since VRS was not an organisation of employees and the minimum fee arrangement benefited self-employed musicians, not employees.

Judgment
The court focussed on requirement (b), by examining whether the minimum fee for self-employed musicians benefits employed musicians. The plaintiff union answered this question affirmatively, because the minimum fee eliminated underpayment of self-employed musicians, thereby reducing unfair competition and reducing the downwards pressure on the employees' terms of employment. The court rejected this argument. Although eliminating underpayment of self-employed musicians is likely to benefit employed musicians indirectly, it does not do so directly. Therefore, requirement (b) was not satisfied, so there was no need to address requirement (a) and the plaintiff lost the case.

Commentary
In The Netherlands, the number of self-employed workers has increased dramatically in the past five to ten years, partly as a consequence of the hard economic times and the scarcity of regular jobs. This is not to the liking of the unions, but there is not much they can do other than attempt to expand their membership to self-employed workers, a policy that to date has not been very successful.

In my view, the most effective way to reduce self-employment would be for the unions to give up their resistance to a relaxation of the dismissal protection laws. That would without doubt lead to employers being more willing to hire regular staff, rather than hiring workers on a self-employed basis. Unfortunately, most of the unions, with their declining and ageing membership, are unwilling to yield.

(Footnotes)
1 ECJ 21 September 1999 case C-67/96 (*Albany*).
2 ECJ 21 September 1999 cases C-115 through 117/97 (*Brentjes*).
3 ECJ 21 September 1999 case C-219/97 (*Drijvende Bokken*).
4 ECJ 21 September 2000 case C-222/98 (*Van der Woude*).

Subject: Collective agreement - anti-trust law
Parties: *FNV Kunsten Informatie en Media* – v – *Staat der Nederlanden* (the State)
Court: *Rechtbank 's-Gravenhage* (District Court of The Hague)
Date: 27 October 2001
Case number: 343076/HA ZA 09-2395
Hardcopy publication: «JAR» 2011/8
Internet publication: www.rechtspraak.nl ➪ LJ Number BO 3551

2011/10

Danish Supreme Court turns off the money printer in relation to failure to inform employee of employment particulars

COUNTRY DENMARK

CONTRIBUTOR MARIANN NORRBOM, NORRBOM VINDING, COPENHAGEN

Summary
Following a period of confusion regarding the level of compensation for inadequate statements of employment particulars, the Danish Supreme Court laid down a number of assessment principles to apply when setting

the correct level. In this particular case, the employee was awarded approximately € 1,350 in compensation for never being issued with a statement of particulars, although he had requested one.

Facts

Since the advent of the Statement of Employment Particulars Act in 1993, implementing Directive 91/533, there has been a wealth of lawsuits. Before the Danish Parliament intervened in 2007, even trivial breaches would sometimes trigger awards of at least approximately € 700.

In March 2007, Parliament amended the Act, limiting awards to a maximum of 13 weeks' pay in ordinary cases and 20 weeks' pay in serious cases. The new law also specified that the courts had to consider whether the breach had a tangible impact on the employee and that in trivial cases awards should not exceed approximately € 150.

If the intention of Parliament was to provide clarification, the amendment of the Act did not achieve the desired effect. Since 2007, case law has not provided any clear guidelines. In the spring of 2010, a district court awarded compensation equal to 20 weeks' pay to a waiter who had not been issued with a statement of particulars. In comparison, the High Court has awarded between two and six weeks' pay.

After a long period of confusion, the Danish Supreme Court then had to consider three different cases concerning inadequate statements of employment particulars and set the level of compensation.

One of the cases concerned a man who never received a statement of particulars although he had asked for one. The employer was covered by a collective agreement, but the employee had never been informed of this. With a little help from his union, he became aware of his rights. In the meantime, the lack of a statement of particulars had caused some confusion as to his notice period and pension entitlements. He decided to bring a claim against the employer.

The employer claimed that the non-existent statement of particulars had not had any tangible effect on the employee and had not given rise to any disagreement with him.

Judgment

On the basis of the explanatory notes to the Statement of Employment Particulars Act, the Danish Supreme Court first of all laid down a number of assessment principles to apply when setting the level of compensation in cases concerning inadequate or non-existent statements of particulars.

If the breach is excusable and has had no tangible effect on the employee, the level of compensation should be between approximately € 0 and 150.

For other breaches and in cases where the employer has issued no statement of particulars at all, the level of compensation should be approximately € 350.

In cases where the inadequate or non-existent statement of particulars has given rise to an actual or potential dispute about the employment relationship, the level of compensation should be approximately € 1,000.

In aggravating circumstances, the level of compensation should be a maximum of 20 weeks' pay. Awards of more than approximately € 3,400 should be reserved for particularly serious cases.

Having regard to the employee's statement of particulars, the Court noted that the failure to provide one had had tangible effects on him, since doubts had arisen about his rights on termination. Also, a dispute had arisen about his overtime pay and pension entitlements. The Court also took into account that he had asked for a statement of particulars and that it was not the first time that the employer had failed to provide employees with one. However, the Court did not find that this was sufficient to constitute aggravating circumstances, and awarded the employee compensation amounting to approximately € 1,350.

Commentary

In Denmark, Directive 91/533/EEC is often implemented through collective agreements. If an employee is not protected by a collective agreement implementing Directive 91/533, he or she will be protected by the Danish Statement of Employment Particulars Act instead, as occurred in this case.

Under the Danish Statement of Employment Particulars Act, compensation in extraordinary circumstances could amount to as much as 20 weeks' pay. In autumn 2010, a district court awarded a record amount of compensation for an inadequate statement of particulars, approximately € 13,500, as reported in EELC 2010-4. The case once again threw doubt on the price employers should pay for being careless about statements of particulars. Danish lawyers have therefore awaited the Danish Supreme Court judgment with great interest.

Now, the Supreme Court has sent a clear signal that the level of compensation awarded by the district courts and the High Court after the amendment of the Danish Statement of Employment Particulars Act was too high.

It seems as if the Supreme Court is getting closer to the level of compensation that used to apply and which still seems to apply in the industrial tribunal system.

Comments from other jurisdictions

Austria (Martin E. Risak): The Austrian law transposing Directive 91/533/EEC (s2 of the Act to Adapt Employment Contract Law, "*Arbeitsvertragsrechtsanpassungsgesetz*") does not provide any explicit sanctions for an employer's breach of its duty to provide an employee with a statement of employment particulars. There is no specific compensation, even where the employee suffers actual harm. The employee is, however, protected by measures under general civil law, i.e. he or she can bring a claim demanding compliance and/or a claim for compensation of loss that he or she has suffered because of the employer's failure to issue the statement of particulars. Disputes about the statement of employment particulars therefore do not feature prominently either in the courts or in legal discussion.

Germany (Paul Schreiner): In Germany, a violation of the "*Nachweisgesetz*" (German transposition of Directive 91/533, "NachwG") does not lead to a misdemeanour by the employer.

If the employer fails to provide the employee with the adequate documentation, the employee can bring a claim against it for not issuing the documentation and also for any harm suffered (e.g. if the employee does not know of a limitation period because of the employer's failure to provide sufficient documentation). Further, an employee may have the right to retain his or her job because of the employer's breach. Such cases are, however, rare.

In addition, the failure of the employer to provide adequate documentation can lead to a shift in the burden of proof, sometimes even a reversal. This is because the employer causes a problem for the employee by failing to issue the required documentation (e.g. where the employee needs to prove that a specific employment condition was agreed on, in the absence of the statement of employment particulars). In such a case, the employee would normally need to prove fewer facts to substantiate a claim than would be the case if the employer had provided the correct documentation.

The Netherlands (Peter Vas Nunes): Why is it that there seem to be frequent disputes in Denmark in connection with (the national law transposing) Directive 91/533, whereas the Dutch law transposing this Directive (Article 7:655 of the Civil Code) is almost totally unknown and very rarely used in litigation? The Dutch case reported in the next case report is a rare exception.

Subject: Danish Statement of Employment Particulars Act, implementing Directive 91/533/EEC
Parties: The Danish Union *3F "Fagligt Faelles Forbund"* acting for *A – v – B*
Court: The Danish Supreme Court
Date: 17 December 2010
Case number: 90/2009
Internet publication: Please contact info@norrbomvinding.com

2011/11

Failure by employer to provide employee with statement of employment particulars does not reverse burden of proof

COUNTRY THE NETHERLANDS

CONTRIBUTOR PETER VAS NUNES, BARENTSKRANS, THE HAGUE

Summary
The employment contract was silent on the weekly number of hours to be worked. The employee claimed he was employed full time (40 hours per week), whereas the employer claimed that the agreement was for work to be performed on an "on-call" basis. Who carried the burden of proof? The fact that the employer breached its duty to provide the employee with a written statement of employment particulars was insufficient to warrant shifting the burden of proof from the employee to the employer.

Facts
An employee was hired for a six-month period between 13 June and 13 December 2005. His contract was silent on the number of hours he had to work per week, and all it stated in respect of his earnings was that he would be paid a base salary of € 8.24 per hour.

In the four-week periods 6, 7 and 8 of 2005 the employee worked and was paid as follows:

Period	Hours	Wage
6	40	€ 322
7	160	€ 1,071
8	61	€ 50

For each of these periods the employee was given a written salary specification, as required by Dutch tax law. These computer-generated specifications included many details, including "part-time percentage: 100".

On 19 September 2005, the employee called in sick, claiming that he was overworked. This irritated the employer, which immediately told the employee that it no longer required his services and stopped paying his salary. The employee brought a claim against the employer.

The court of first instance found that the plaintiff had been dismissed with immediate effect, the termination was invalid, the employment agreement therefore continued beyond 19 September 2005 and the plaintiff was entitled to payment of his salary for the remaining duration of his employment[1] in the amount of 40 hours x € 8.24 per hour = € 329.60 per week. The employer appealed.

Judgment
The Court of Appeal, proceeding from the invalidity of the termination, focused on the issue of burden of proof. Was the plaintiff employed on a full-time (40 hours per week) basis as he claimed, or on an on-call basis as the employer claimed? The principal rule of evidence is that whoever alleges a fact bears the burden of proof with respect to that fact in the event the other party disputes it. According to this rule, the plaintiff would need to prove that he was employed on a full-time basis. However, if a plaintiff provides sufficient *prima facie* evidence of his or her claim, the court may shift the burden of proof to the defendant. The plaintiff in this case relied on this rule. Pointing to the fact that the three salary specifications he had received all mentioned "part-time percentage: 100", he argued that his employer would need to prove that the parties agreed to an on-call arrangement, i.e. an arrangement whereby the employer determines how much work the employee gets and pays only for the hours actually worked.

The Court of Appeal applied Article 7:655 of the Civil Code, which is the Dutch transposition of Directive 91/533. Article 7:655 requires employers to provide their employees with a written specification of their main terms of employment, including the number of hours during which they must, as a rule, perform their work. Article 7:655 does not indicate what the consequence of breaching this duty is. In particular, it does not provide for a shift in the burden of proof. In fact, at the time the Bill that led to Article 7:655 was debated in Parliament, the government noted that this Article would not have the effect of altering the existing law on evidence and that it was up to the courts to determine what the evidenciary consequence would be of failure by an employer to provide an employee with the required written information.

Given that national law is to be interpreted, wherever possible, in line with Directive 91/533, the court looked at Article 6 of that Directive. This provision, however, was found not to shed light on the issue, merely providing, *"this Directive shall be without prejudice to national law and practice concerning [...] proof as regards the existence and content of a contract or employment relationship [...] procedural rules"*. In its ruling in the *Kampelmann* case[2], the ECJ had held, *"that the notification referred*

to in Article 2(1) of the Directive [...] enjoys the same presumption as to its correctness as would attach, in domestic law, to any similar document drawn up by the employer and communicated to the employee". This led the court to conclude that the employer's failure to provide the employee with the required written information was insufficient to warrant shifting the burden of proof. Therefore, the judgment by the court of first instance needed to be overturned. However, this did not necessarily mean that the employee's claim would be dismissed, because there was still the fact that the salary specifications mentioned "part-time percentage: 100". The Court of Appeal wished to know how to interpret this wording and summoned the parties to appear in court in order to discuss it. The case was adjourned.

Commentary

Clearly the Danish courts have a different view on Directive 91/533 than the Dutch courts have. However, this judgment has been criticised by several Dutch authors.

Comments from other jurisdictions

Austria (Martin E. Risak): To date, there has been no Austrian case law dealing with the effect on the burden of proof in the case of an employer failing to provide an employee with a written specification of his or her main terms of employment. It has been argued in legal literature that in this case the employer must prove the existence of agreed terms that differ from the customary employment practices in the enterprise or industry. Based on this argument, a shift in the burden of proof would depend on whether the work performed is usually part of a full-time employment contract or is done on an on-call basis.

Denmark (Mariann Norrbom): In Denmark, Directive 91/533 is implemented by the Danish Statement of Employment Particulars Act. The difference between Danish and Dutch law should not necessarily be seen as reflecting a difference in how the courts interpret the scope of Directive 91/533, but probably more as a reflection of the fact that the Danish courts have been unsure of how the Danish implementation Act should be understood.

Article 8.1 of the Directive reads as follows:

"*Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities*".

As mentioned in the previous case report, this provision has been implemented into Danish law through the option in the Danish Statement of Employment Particulars Act of awarding compensation in the amount of up to 20 weeks' pay. So far, the question of how the Danish Statement of Employment Particulars Act is to be interpreted has been much disputed. Over the years, the Danish trade unions have brought a great number of claims on behalf of their members on this issue, as it has been a relatively easy way to win a substantial amount of money for their members. The Danish judgment reported above may put a stop to a great deal of such claims.

Germany (Paul Schreiner): In Germany, a violation of the "*Nachweisgesetz*" (German transposition of Directive 91/533, "NachwG") does not lead to a misdemeanour by the employer. If the employer fails to provide the employee with adequate documentation, the employee can bring a claim against it for not issuing the documentation and also for any harm suffered (e.g. if the employee does not know of a limitation period because of the employer's failure to provide sufficient documentation). Further, an employee may have the right to retain his or her work because of the employer's breach. Such cases are, however, rare.

Also, the failure of the employer to provide adequate documentation can lead to a shift in the burden of proof, sometimes even to a reversal. This is because the employer causes a problem for the employee by failing to issue the required documentation (e.g. where the employee needs to prove that a specific employment condition was agreed on, in the absence of the statement of employment particulars). In such a case, the employee would need to prove fewer facts to substantiate a claim than would be the case if the employer had provided the correct documentation.

(Footnotes)

1 Normally, the agreement would have continued until 13 December 2005, the end of the six-month period for which the plaintiff was hired, but for a reason not relevant to this publication it was deemed to have ended on 10 October 2005.

2 ECJ 4 December 1997, joined cases C-253 through 258/96 (*Kampelmann*).

Subject: Evidence of terms of employment
Parties: names not published
Court: *Gerechtshof* (Court of Appeal) Leeuwarden
Date: 7 December 2010
Case number: 107.002.525/01
Hardcopy publication: JAR 2011/55
Internet publication: www.rechtspraak.nl ➪ LJ Number BP 1055

2011/12

Final word on the Goodyear case: Greek employees may rely on the Collective Redundancy Directive

COUNTRY GREECE

CONTRIBUTOR EFFIE MITSOPOULOU AND IOANNA ARGYRAKI, KGDL LAW FIRM, ATHENS

Summary

Until 2007, Greek courts interpreted their domestic law by implementing the Directive on Collective Redundancies in such a way that it did not apply in the event that an employer completely terminates its activities. However, following a ruling by the ECJ, the Greek Supreme Court was compelled to adopt a different approach. As a result, an employer relying on the old case law fell victim to this change in interpretation.

Facts

Goodyear Dunlop Tires Hellas SA ("Goodyear Hellas") had its administrative and commercial departments in Athens and its production facilities (a tyre factory) in Thessaloniki. On 19 July 1996, its American shareholder decided to close down the factory three days later. Accordingly, in the period between 22 July and 31 August 1996, management of Goodyear Hellas dismissed all 340 employees who were employed in the factory, with immediate effect. About 100 of these employees brought legal proceedings (the present case) and 220

more did so in other, similar cases. They claimed that their dismissal was void and that they were therefore entitled to continued payment of their salaries. They based their claim on the fact that Goodyear Hellas had failed to give notice to the competent public body, to consult with employee representatives and to observe a one-month waiting period as provided in the Collective Redundancy Directive 75/129 and the Greek law transposing this Directive, Law 1387/1983.

The court of first instance and the appellate court turned down the employees' claim. They did this on the basis of Article 2(2)(c) of Law 1387/1983, which provided, in line with the Directive, that *"The provisions of this Law shall not apply to employees who are dismissed by reason of the termination of the undertaking's or establishment's activities following a first-instance judicial decision"*. Although the decision to close down the factory was made at management's discretion and was not taken *"following a judicial decision"*, Greek case law as it stood at the time, held that a collective redundancy resulting from an employer's decision to close down a plant entirely was nevertheless exempt from the collective redundancy rules.

The employees appealed to the Supreme Court, which in 2005[1] (almost nine years after the dismissals) referred to the ECJ the following question for a preliminary ruling:

"Given that Greek (national) law does not provide for a prior judicial decision where an undertaking or establishment is closed down definitively of the employer's own volition, under Article 1(2)(d) of Council Directive 75/129/EEC does that directive apply to collective redundancies caused by the definitive termination of the operation of an undertaking or establishment which has been decided on by the employer of his own accord without a prior judicial decision on the matter?"

The ECJ answered the question affirmatively[2]. Article 1(2)(d) of Directive 75/129 (as it stood in 1996[3]) concerns the Directive's inapplicability to redundancies caused by the termination of an establishment's activities *"where that is the result of a judicial decision"*. An example of such a judicial decision is one ordering the compulsory liquidation or the winding-up of a company. *"In all other cases"*, so the ECJ noted, *"including where the definitive termination of the activities [...] is of the employer's own volition and where it is founded on assessments of an economic nature or of another kind, the employer's obligations, flowing from Directive 75/129, remain intact"*. In brief, the way the Greek courts had until that time interpreted Law 1387/1983 was incompatible with Directive 75/129.

Following the ECJ's ruling, in 2007, the Greek Supreme Court determined that the appellate court had breached Greek and EU law. It referred the case back to the appellate court (now judging in a different composition)[4].

Judgment

This time round, the Court of Appeal found in favour of the employees[5]. In doing so, it rejected Goodyear Hellas' argument that it was entitled to rely on the Greek case law that existed in 1996. That case law was clear, exempting collective redundancies such as the one at issue from the scope of Law 1387/1983. There was no way, so Goodyear Hellas argued, that it could have predicted in 1996 that the Greek courts would change their interpretation of the law. The court did not accept this view, observing that a change in case law is always possible and does not qualify as *force majeure*.

The Court of Appeal's judgment, delivered in 2008, was not the end of the story. The case went up to the Supreme Court a second time and the Supreme Court, overturning the judgment on a minor point (Easter bonus)[6], referred the case back to the Court of Appeal, which will now, again in a different composition, try the case for the third time.

Commentary

The Court of Appeal's 2008 judgment in this long-standing dispute represents a total reversal of Greek case law on collective dismissals. The Supreme Court's 2007 judgment that paved the way for this reversal brought home to Greek employment lawyers how important EU law is for their day-to-day practice.

Article 5(3) of Law 1387/1983 explicitly provides that the rules that normally govern collective dismissal situations do not apply where a company's activities are terminated following a judicial decision, as for example in the event of an insolvency. In other words, those rules do apply where a company's activities are terminated by management, in which case, upon completion of the consultation/information procedure, the public authority can prohibit the collective dismissals. Legal theory and authors have criticised this position, supporting the view that in the event that an undertaking's activities are terminated finally and permanently, completion of the consultation procedure should be sufficient, without approval of the dismissals by the public authority being required.

Comments from other jurisdictions

Germany (Paul Schreiner): From a German point of view, this decision seems rather strange. First of all, German law does not contain an exemption from the duty to consult with the works council in cases of a judicial decision. In accordance with s22 of the German Unfair Dismissal Protection Act, the only exemption from this duty applies to establishments that typically employ staff for no more than one season per year or for one specific project.

As regards the protection of confidence in case law, many unusual situations have arisen in Germany: see my comment under the case reported in EELC 2011/13 ("Spanish Supreme Court follows *Schultz-Hoff*"), in which the courts found that an employer could not rely on existing case law following a change in the relevant European directives, even if this case law was continued after the Directive became effective.

The Netherlands (Peter Vas Nunes): Two aspects of this case strike me. The first is that I fail to understand how the Greek courts, until 2008, managed to construe Article 2(2)(c) of Greek Law 1387/1993, which seems clear to me ("... *following a* [...] *judicial decision*") as meaning the opposite of what it said. My second observation is that it feels somewhat unfair that Goodyear Hellas became the victim, 12 years after the collective redundancy, of a change in case law that it had no way of predicting. A Dutch court would most likely have taken this into consideration when determining (the extent of) the workers' compensation.

(Footnotes)

1 Supreme Court, decision 25/2005.
2 ECJ 7 September 2006, joined cases C-187 through 190/05 (*Agorastoudis et al – v – Goodyear Hellas).*
3 Article 1(2)(d) was deleted in 1992 and replaced by the present Articles 3(1) and 4(4): see Directive 92/56.
4 Supreme Court, decision 38/2007.
5 Athens Court of Appeal, decision 5260/2008.
6 Supreme Court 4 May 2010, decision 1068/2000.

Subject: Collective redundancy
Parties: *Agorastoudis and approximately 100 others – v – Goodyear Hellas*
Court: Athens Court of Appeal
Date: 15 September 2008
Case number: 5260/2008
Internet publication: www.areiospagos.gr ➪ 1068/2010

2011/13

Spanish Supreme Court follows Schultz-Hoff

COUNTRY SPAIN

CONTRIBUTOR ANA CAMPOS, CUATRECASAS, MADRID

Summary
The ECJ's rulings in *Schultz-Hoff*, *Stringer* and *Pereda* have forced the Spanish Supreme Court to change its doctrine in respect of paid annual leave accrued during sick leave.

Facts
Mr Pascual had been employed as a driver by a construction company since 1988. He was on sick leave from 30 July 2007 until 9 January 2009 (a total of 17 months) and did not take any paid annual leave during that time. Upon returning to work, he asked his immediate boss for the paid annual leave accrued during his sick leave in 2007 and 2008. The company did not respond, whereupon Mr Pascual brought a claim against it.

The court of first instance decided in favour of Mr Pascual. The company appealed to the Court of Appeal in Navarra. This court also ruled in Mr Pascual's favour. It confirmed his right to the paid annual leave he had accrued in 2007 and 2008, and it ordered the company to give it to him.

The company appealed to the Supreme Court, alleging that the Superior Court's decision was contrary to a decision issued by the Court of Appeal in Aragon in a similar case, and that it was the Supreme Court's duty to unify the doctrine.

The Supreme Court agreed that there was a contradiction between the two decisions and decided to unify the doctrine, following the criterion that the ECJ provided in its *Schultz-Hoff* ruling[1]. That ruling had forced the Spanish Supreme Court to amend its established jurisprudence, which had held that sick leave does not entitle employees to take accrued paid annual leave at a later date. This doctrine had applied to the scenario where an employee was on sick leave during previously agreed paid annual leave, or following the calendar year in which the paid annual leave had accrued.

According to the ECJ, *"Article 7(1) of Directive 2003/88/EC [...] must be interpreted as precluding national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave"*.

As a consequence, the Supreme Court ruled in accordance with the ECJ's interpretation of Article 7 of Directive 2003/88. It did so by interpreting two provisions of Spanish law, namely Article 40 of the Spanish Constitution, which guarantees the right to rest, and Article 38 of the Workers' Statute, which regulates annual leave for workers, in a way that makes them compatible with EU law. Thus, the Supreme Court confirmed that Mr Pascual was entitled to take the paid annual leave he had accrued during his 17 months' sick leave.

Commentary
Until January 2009, the Spanish Supreme Court had consistently denied an employee the right to accrued paid annual leave when a period of sick leave had impeded him or her from using it. The ECJ's rulings in *Schultz-Hoff*, *Stringer* and *Pereda* forced the Spanish Supreme Court to change its doctrine. The first case in which it did so was issued in June 2009 and this was followed by several similar judgments. The decision reported above was one of the first to determine that, after lengthy periods of sick leave, the affected employees are entitled to all paid annual leave accrued during that time.

This decision, which is in line with the ECJ's doctrine, made Mr Pascual eligible to three months' paid leave in 2009: one month[2] for year 2007, one month for year 2008 and, assuming he continued to be employed by the company throughout the entire year 2009, one month for 2009[3]. Therefore, upon returning to work after being absent for 17 months, Mr Pascual was entitled to three months' accrued paid annual leave.

While the reasoning of the Court of Justice in reaching its decision is sound, there are some cases, such as this one, where it may lead to difficulties. Employers may find it hard to accept that employees who have not rendered services for a lengthy period of time are entitled to paid annual leave. In fact, the Constitutional Court does not consider termination of sick employees' employment contracts to be discriminatory, unless the illness entails social stigmatisation or discrimination. Therefore, in my opinion, this jurisprudence may give rise to termination of employment contracts during sick leave, which would be legally unfair, but not unlawful.

Comments from other jurisdictions
Austria (Martin E. Risak): The issues discussed above are unlikely to arise in Austrian courts, as the Austrian Vacation Act ("*Urlaubsgesetz*") includes the following provisions: an employee is not only entitled to paid annual leave for times when he or she is on sick leave (during which the employer must continue paying sick pay), but also for those times when the employer is not required to pay sick pay. If an employee becomes ill during scheduled paid annual leave, the period of illness is not counted as part of it, if the illness lasts more than three (calendar) days. Though generally speaking the entire paid annual leave entitlement for one year should be taken within that year, entitlements are not forfeited if they are not taken in full. The Vacation Act provides that entitlement to paid annual leave is lost two years after the end of the annual leave year in which it arose.

Czech Republic (Nataša Randlová): The Czech Labour Code stipulates that it is mandatory for employers to reduce employees' paid annual leave, if they are absent from work on account of sickness. The employer must reduce paid annual leave by one twelfth for the first

100 excused working days and then by one twelfth for every further twenty-one excused working days. Such a reduction is mandatory and the employer must not deviate from this rule.

Although these provisions of the Czech Labour Code are not in compliance with the ECJ's interpretation of the Working Time Directive 2003/88, the employee's claim in this case would most likely fail before Czech courts, because the employer must follow Czech legal provisions. The only option for the employee would be to bring a claim against the Czech Republic for its failure to properly implement this Directive.

France (Claire Toumieux & Susan Ekrami): This decision is in line with recent French case law. Indeed, French case law has also been influenced by Article 7 of European Directive 2003/88/EC, providing that if an employee has been unable to take paid annual leave during the relevant period because of absences related to sickness, a work accident or occupational disability, the accrued paid annual leave will be carried over and can be taken upon his return to work.

Very recent case law goes even further by providing that, when a collective bargaining agreement or statutory provision prohibits paid annual leave from being carried over, such provision should be set aside in the case of sickness (Cass. Soc. 11 January 2011, no 09-65.514). The employee concerned would therefore benefit from either the carrying over of his untaken paid annual leave or receipt of a paid annual leave indemnity.

Germany (Paul Schreiner): The federal court for labour law in Germany ("*Bundesarbeitsgericht*", "BAG") has also changed its stance following the *Schultz-Hoff* decision and now follows the ruling of the ECJ. Therefore, the case would have been handled similarly in Germany. In 2010, the BAG also held that ever since 23 November 1996, when Directive 93/104 came into force, employers could not rely on case law prior to *Schultz-Hoff*. This seems quite astounding since up until the year 2006, the German courts still applied the BAG's old case law, which excluded entitlement to paid annual leave for periods in which the employee suffered from continued illness.

However, currently the main problem with regard to *Schultz-Hoff* is the treatment of non-mandatory entitlement to paid annual leave. If an employment contract foresees an entitlement to paid annual leave above the statutory minimum, it is unclear whether this additional entitlement also follows the rules of *Schultz-Hoff*. The majority of German courts seem to follow an interpretation that also applies the rulings of *Schultz-Hoff*. Strictly speaking one could argue that entitlement to paid annual leave exceeding the statutory minimum is purely contractual and not based on national legislation, and therefore the question of whether forfeited paid annual leave is subject to the interpretation of the contract. In most cases (which do not contain a reference to the Federal Vacation Act), the interpretation will probably be that any entitlement to paid annual leave will be time-limited.

From a practical point of view, since *Schultz-Hoff* there have been more cases of termination of employment because of illness. In the past, employers tended to simply wait for the convalescence of the employee to see whether or not he or she could continue to be employed. Because of *Schultz-Hoff*, entitlement to paid annual leave continues to increase, as do the employer's financial duties. As a consequence, employers now tend to terminate employment contracts in such situations significantly faster than they did in the past.

The Netherlands (Peter Vas Nunes): My reading of *Schultz-Hoff* is that it applies exclusively to the statutory minimum number of days of annual paid leave, i.e. 20 per year (for a full-time employee) and that the parties to an (individual or collective) employment contract are free to agree what they wish in respect of any additional days. The Dutch Parliament is presently debating how to amend the law in the light of *Schultz-Hoff*.

United Kingdom (Hannah Vertigen): The UK has seen several recent employment tribunal decisions applying the ECJ's rulings in the *Stringer*, *Schultz-Hoff* and *Pereda* cases, despite the fact that the UK legislation implementing the Working Time Directive is not, on a strict interpretation, consistent with those rulings. In *Shah – v – First West Yorkshire Ltd* (case no 1809311/09, unreported), for example, a tribunal went so far as to draft an additional paragraph for inclusion in the UK legislation to ensure that it was consistent with *Pereda* in allowing the carry-over of accrued paid annual leave where sickness has prevented the employee from taking it.
However, other tribunal cases have preferred a strict interpretation of the UK legislation, which does not on its face allow the carry-over of annual leave from one leave year to the next. For example, in *Khan – v – Martin McColl* (case no 1702926/2009, unreported), an employee who had not exercised his right to take holiday during an extended period of sick leave was unable to make a claim in respect of that holiday. The tribunal reasoned that he had not been denied the opportunity to take the annual leave: he had merely not exercised his right to do so. As a result, annual leave from previous years was no longer available for him to take.
All of these cases have been first instance decisions, which are not binding on other tribunals or courts. As such, there is a need for a ruling from a higher court that deals comprehensively with the issues and properly addresses the disparity between the UK legislation and case law from the ECJ.

(Footnotes)
1 ECJ 20 January 2009 joined cases C-350/06 (*Schultz-Hoff*) and C-520/06 (*Stringer*), later confirmed in ECJ 10 September 2009 case C-207/08 (*Pereda*).
2 Most employees in Spain accrue 22 days' paid leave per year, almost always taken in the month of August, whether the employee wishes to take it then or not.
3 Mr Pascual would have had to take these three months' paid leave before the end of 2009, because in accordance with Spanish law, in the absence of an agreement with the employer or a collective agreement to the contrary, or a *Schultz-Hoff*-type situation or maternity rights, the right to take paid annual leave extinguishes if it is not taken before the end of the calendar year in which it accrued.

Subject: Vacation time and sick leave
Parties: *Pascual – v – Fomento De Construcciones Y Contratas, S.A*
Court: *Tribunal Supremo* (Supreme Court)
Date: 6 July 2010
Case number: Recurso 519/2010
Internet publication: www.poderjudicial.es ➪ Tribunal Supremo ➪ jurisprudencia ➪ accesso directo a la BD ➪ case number

2011/14

Employer may not deny bonus to employees who participate in an unlawful strike

COUNTRY FINLAND

CONTRIBUTOR KAJ SWANLJUNG, ROSCHIER ATTORNEYS, HELSINKI

Summary

It was deemed discriminatory and a breach of the employer's duty to respect employees' freedom of association for an employer to refuse to pay bonuses to employees who had participated in unlawful trade union strikes. However, this did not entitle the employees to separate compensation for discrimination.

Facts

The Stora Enso group of companies (the "Group") operated a result-based bonus scheme for its employees. The terms of the bonus scheme were decided annually and unilaterally by the Group. In 2005, the Group added a new condition to the scheme: employees who participated in unlawful strikes would see their bonuses reduced by an amount corresponding to the employee's share in the loss suffered by the employer because of the strike.

In May 2005, the Union of Salaried Employees organised a strike, which affected Stora Enso Ingerois Oy, one of the Group's subsidiaries. The Finnish Labour Court deemed the strike unlawful. Invoking the new restrictive condition of the Group's bonus scheme, management of the subsidiary refused to pay the result-based bonuses to the employees who had participated in the strike.

The employees whose bonuses were left unpaid ("Applicants") brought a claim against their employer for failing to pay the bonuses and further claimed that they were entitled to compensation for discrimination under the Non-Discrimination Act (21/2004).

Judgment

First, the Supreme Court found that the scheme constituted neither a contract nor an established practice. Therefore, the Group was entitled to amend it unilaterally.

The Supreme Court then examined whether the new condition in the bonus scheme represented a restriction of the employees' right to participate in trade union activities in light of the freedom of association under Article 11(1) of the European Convention on Human Rights ("ECHR"), which provides that *"everyone has the right to [...] join trade unions for the protection of his interests"*. The result of this examination was that the employer could not amend the bonus scheme in a manner that would breach its mandatory duties under Finnish law, including its duties not to restrict employees' freedom of association, not to discriminate against employees, and not to treat employees in comparable situations differently without justifiable grounds.

Based on ECHR case law, the Supreme Court held that the right to strike is part of the freedom of association and that this right may be restricted only by law and in a manner consistent with Article 11(2) ECHR, which provides that *"No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others"*. The Supreme Court noted that the right to participate in industrial actions organised by trade unions is not restricted under Finnish law. Nonetheless, the Supreme Court examined whether the fact that the strike in question was unlawful was relevant. It was not, given that under Finnish law only the trade unions themselves bear responsibility for unlawful strikes. Thus, employees cannot be punished for participating in trade union activities, even if those activities would subsequently be found to breach the trade union's duties. Even strikes that are unlawful for trade unions are thus legitimate trade union activities for employees and are protected as such.

While the Court found that the aim of the Group as such was to protect a legitimate business interest, the measures taken nonetheless meant restricting the employees' freedom of association. In addition, those measures were discriminatory, because they meant assigning responsibility to employees for trade union actions in a manner incompatible with Finnish law. Therefore, the new restrictive bonus condition could not be applied.

The Applicants also claimed that their employer's actions entitled them to compensation for discrimination under the Non-Discrimination Act. The court concluded that, whilst treating someone differently because of membership of an association is encompassed by the definition of discrimination in the Non-Discrimination Act (which lists various forms of discrimination, including "other personal characteristics", which is deemed to include trade union membership), the provision dealing with compensation for discrimination recognises only a narrower scope of discrimination and contains an exhaustive list of grounds on which compensation may be granted, association membership not being one of those grounds.

The Applicants argued that their entitlement to compensation would be based on discrimination on the grounds of belief and opinion, both of which are covered by an entitlement to compensation, but the Court found that the employees had not been treated differently because of their ideology or opinions, but instead because they had participated in trade union activities with the aim of asserting economic interests. Therefore, the Applicants had not been discriminated against based on opinions or beliefs and were not entitled to compensation.

Commentary

The Finnish system for prohibiting discrimination is based, *inter alia*, on Directives 2000/43/EC and 2000/78/EC. The provisions governing protection against discrimination are divided amongst three partially overlapping Acts: the Employment Contracts Act 55/2001, containing a general prohibition against discrimination; the Act on Equality between Men and Women 609/1986, concerning gender-based discrimination; and the Non-Discrimination Act, for forms of discrimination not based on gender. Therefore, the system is complex, and at times considerably so.

Even though the bonus was acknowledged to be discretionary, the employer's decision to limit bonuses for striking employees was considered incompatible with mandatory law, as it would have resulted in a breach of the employer's mandatory duties. The decision by the Court is in line with previous legal doctrine, in accordance with which employees can have their employment terminated for participation in an unlawful strike, only if the strike has not been initiated by or contributed to by a trade union. Protection for trade union activities is therefore strong.

The Court's interpretation of the criteria under which employees who have suffered discrimination may be entitled to compensation under the Non-Discrimination Act is interesting, but not surprising. It must be noted that in relation to the compensation in question, whether the employees might have been entitled to compensation for loss

caused by the discrimination was not addressed in the case. Instead, compensation in this case referred to a punitive payment of a fixed maximum amount. Because the Non-Discrimination Act provides an "assumption of discrimination" (i.e. that if an employee claiming discrimination can demonstrate *prima facie* that his or her claim is not unfounded, the burden of proof shifts to the employer), it is prudent of the Court to interpret the entitlement to compensation narrowly.

Comments from other jurisdictions

Austria (Martin E. Risak): Austria does not have any legislation dealing with the effect of industrial action on the individual employment relationship, nor has it developed jurisprudence on these issues (because for some decades there have been few strikes). Therefore, industrial action legislation is for the most part based on rather outdated academic literature with little practical relevance. A prevalent opinion still holds that a striking employee is in breach of his or her duty to work and therefore always loses the right to receive pay and may also be summarily dismissed.

France (Claire Toumieux & Susan Ekrami): Under French law, any pecuniary sanction is prohibited, even if employees take part in an unlawful strike. If taking part in an unlawful strike is considered as a form of misconduct, the employer can only impose non-pecuniary sanctions on the employees involved.
Indeed, this was confirmed by the Supreme Court in a decision dated 17 April 1991 (no 1707 *Omi-cron et Maurel – v – Edimo-Ekhoutou*), where the employer had imposed a reduction in salary on employees who had taken part in a go-slow strike ("*grêve perlée*"), which is unlawful in France. The judges held that such a reduction was a pecuniary sanction and therefore prohibited.

Germany (Paul Schreiner): The legal situation in Germany differs from the Finnish one in many ways. First of all, unlawful strikes are usually so-called "wild strikes", meaning that they are not initiated or endorsed by a trade union. In general, the term "strike" only refers to a situation in which the employees try to force a settlement with the employer in the form of a collective bargaining agreement. Such collective bargaining agreements, however, can only be concluded with the trade union on one side and the employer on the other. A strike that cannot lead to such a collective bargaining agreement is therefore considered unlawful.
In such a case, the participating employees can in principle not only have their employment terminated, but may also be held liable for the harm caused by the unlawful strike. In practice, such cases are rare, because usually a trade union will endorse the strike at some point, with the intention of beginning to represent the employees. Usually, an agreement will be reached in which any liability of the participating employees will be excluded.
Apart from this, the main issue with the Finnish decision was whether or not the participation in an unlawful strike could be seen as a reason for refusing to make a bonus payment. Since unlawful strikes led by trade unions are very rare in Germany, in practice this particular problem has not arisen. However, if this case were to arise in Germany, a court would probably ask the same question, namely, whether or not the employee suffered a detriment as a result of his or her membership of the trade union. If so, the bonus could not be cut. However, in my view, it is likely that the court would also consider the fact that strictly speaking, the reduction of the bonus did not result from membership of the trade union, but from participation in an unlawful strike. Such participation, however, is not lawful in Germany and cannot in principle result in termination of employment and a claim for compensation by the employer. Therefore, it might be arguable that the failure to pay the bonus is lawful under German law.

United Kingdom (Tarun Tawakley): UK employees have the right not to be subjected to any detriment (e.g. withdrawal of benefits) for taking part in trade union activities. This protection is limited to certain activities, such as attending trade union meetings, and does not include taking part in strike action whether lawful or otherwise.
The protection afforded to employees taking part in strike action is limited to unfair dismissal, as opposed to a more general protection against being subjected to a detriment. Where a trade union authorises its member to take part in strike action, but that action is nonetheless unlawful, the employer may dismiss *all* those employees who took part in the unlawful strike action. The relevant employees would only have a claim for unfair dismissal, if the employer selectively dismissed some, but not all, of the employees (or, having dismissed all the relevant employees, selectively re-engaged only some of them).
If a case like *Stora Enso* was brought in the UK, rather than contending that the withdrawal of the bonus was a 'detriment' short of dismissal, the employees might be able to argue that it amounted to a fundamental breach of contract, thus enabling them to treat themselves as constructively dismissed. That would not, however, be an attractive stance as the employer would counter that the withdrawal of the bonus was in response to the employee's own fundamental breach of contract in engaging in industrial action.
To date, the UK courts have been unwilling to interpret Article 11 of the European Convention on Human Rights as incorporating a positive right to strike. This is currently the subject of a legal challenge by a trade union against the UK in the European Court of Human Rights.

Subject: Freedom of association, industrial actions, bonuses
Parties: *Stora Enso Ingerois Oy – v – group of employees*
Court: The Finnish Supreme Court
Date: 22 December 2010
Case Number: KKO 2010:93
Internet publication: http://www.kko.fi/53067.htm (in Finnish and in Swedish)

EELC 2011/15

Damages are not an effective and adequate sanction against the abuse of fixed-term contracts in public employment

COUNTRY ITALY

CONTRIBUTOR LUCA CALCATERRA, UNIVERSITY OF NAPLES AND CATERINA RUCCI, BIRD & BIRD, MILANO

Summary
The abuse of fixed-term contracts in the Italian public sector has become so widespread that a court has declared unlawful the distinction between the law in the public sector (where a fixed-term

contract cannot convert into a permanent contract) and the private sector (where such conversion is possible).

Facts

Laura Wilmer ("the plaintiff") was an assistant in a state school in Italy, hired for a fixed term that ended on 30 June 2008. When her contract was not renewed, she claimed that she had been hired to satisfy permanent, not temporary, needs of the school. She claimed that she should therefore have been hired for an indefinite period of time and that, as a result, her contract should be converted into a permanent one. Accordingly, she demanded to be reinstated. This demand was based on the fact that Italian law, pursuant to Clause 5 of the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70/EC (the "Framework Agreement"), allows the conclusion of fixed-term contracts only when there are organisational or technical reasons for not offering a permanent contract. It is a breach of the rules for an employer to hire someone for a fixed term without there being a good reason for not hiring that person permanently. In the private sector the penalty for such a breach is, essentially, that the contract is deemed to be permanent. In the public sector, however, the penalty is that the employee can make a claim for pecuniary damages. For this reason, the plaintiff requested the court, in the alternative (i.e. in the event the court were to turn down her demand for reinstatement) to award her damages equal to the income she would have earned until retirement age, had she continued in her job[1].

It should be noted that Italian law specifically provides that in the public sector a fixed-term contract cannot convert into a permanent contract. Knowing this to be the case, the plaintiff argued that abuse is so widespread in the public sector (employers preferring to pay damages than to comply with the rules), that the penalty for abuse is an ineffective deterrent. This is incompatible with the Framework Agreement, so the plaintiff argued, and therefore, the same penalty should be applied as in the private sector, namely conversion into permanent employment.

The plaintiff brought an action before the local labour court.

Judgment

The Tribunal of Siena ruled that the legal sanction against the abuse of fixed-term contracts in public employment cannot follow rules that differ from those in private employment. More precisely, the judge held that the duty to pay damages is not an effective and adequate sanction against the abuse of fixed-term contracts in public employment, as evidenced by their continuous use in the public sector to satisfy stable requirements. The judge referred to ECJ case law, including the ruling in *Angelidaki* (2009, case C-378-380/07), in which the ECJ ruled that *"it is [...] for the referring court to determine to what extent the conditions for application and effective implementation of the relevant provisions of domestic law constitute a measure adequate for the prevention and, where relevant, the punishment of the misuse by the public authorities of successive fixed-term employment contracts or relationships"*.

Accordingly, the plaintiff's employment was declared to be of a permanent nature and the defendant was ordered to reinstate her.

Commentary

This is the first time an Italian judge has found that damages are not an adequate and effective sanction against the abuse of fixed-term contracts in public employment. Beyond that, the judgment is interesting because it is the first time an Italian judge has expressly treated the termination of an employment contract by expiry of an unjustified fixed term as a wrongful dismissal, ruling that in both cases the principle formulated in Article 30 of the Charter of Fundamental Rights of the EU should be applied. This provision states that *"every worker has the right to protection against unjustified dismissal"*. Based on this, the judge held that the plaintiff's contract was only partially invalid, inasmuch as it contained a fixed-term clause. Accordingly, the judge declared the existence of a permanent contract between the parties i.e. the conversion into a contract of indefinite duration of the fixed-term employment contract, which having been intended to cover both fixed and permanent needs of the employer, must be regarded as constituting abuse.

The conclusions reached are interesting when compared to other jurisprudence of the same and other Tribunals[2], which has normally focussed on the amount of compensation that would be adequate and effective to compensate for abuse of the law on fixed-term contracts.

Comments from other jurisdictions

Germany (Paul Schreiner): German law does not distinguish between public and private employers with regard to sanctions. If an employer concludes fixed-term contracts without a valid reason (it is possible in Germany to conclude a fixed-term employment contract without a specific reason for the first two years of employment), the employment is deemed to be concluded for an indefinite period of time.

The Netherlands (Peter Vas Nunes): The increased use of fixed-term employment contracts in many European countries has undoubtedly been caused by the high level of protection accorded to workers on a permanent contract. In The Netherlands, the difference in dismissal protection between fixed-term workers and permanent workers is so enormous that, when one takes into account that fixed-term workers tend overwhelmingly to be young, female and/or of foreign descent, there is an issue of social unfairness, often referred to in Dutch literature as the "insider/outsider" issue. Those already in the regular labour market are protected at the expense of the underprivileged "outsiders". I can imagine that the Italian judge in the case reported above may have been inspired by this unfairness to deliver a judgment that to me seems daring, even revolutionary.

United Kingdom (Anna Sella): The Framework Agreement is incorporated into UK law by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which apply to public sector employees in the same way as to other employees (apart from some narrow exceptions, e.g. for the armed forces). There is no split, as in Italian law, between remedies in cases of private and public employment.

Under the 2002 Regulations, fixed-term employees must not be treated less favourably than permanent employees, unless the employer can objectively justify such treatment, in relation to:

- any period of service qualification relating to any particular condition of service (e.g. making certain benefits conditional upon a certain number of years' service);
- the opportunity to receive training; or
- the opportunity to secure any permanent position in the establishment.

The last strand would open the way for someone in Ms Wilmer's position to argue that they ought to be employed under a permanent contract. Additionally, under the Regulations, those who have been

employed for four or more years on two or more successive contracts *automatically* become permanent employees, on the same terms and conditions as their fixed-term contracts, except that their contracts will then be for an indefinite period. Finally, fixed-term employees whose contracts are not renewed are entitled to claim unfair dismissal in the same way as permanent employees.

(Footnotes)

1 The criteria for calculating the amount of damages vary from court to court. Some courts refer to the rules on unfair dismissal (under which the employee can choose to receive 15 months' salary, if he or she does not demand reinstatement), others add further damages (some around five months' salary, which is the legal minimum in the event the employee does not demand reinstatement) and some courts have recently opted for a new criterion, based on the average time needed to find a new job.

2 See for example Trib, Genova 14 December 2006 (not published) and Trib, Rossano Calabro 4 June 2007 – in Foro Italiano, 2007, I, 2589.

Subject: Fixed-term contracts in public employment
Parties: *Laura Wilmer – v – Ministero dell' struzione dell' Università e della Ricerca e Ufficio Scolastico Regionale per la Toscana* (Ministry of Education; University and Research and Regional education office for Tuscany)
Court: *Tribunale di Siena*
Date: 15 October 2010
Case number: RGL 662/2010 (i.e. the registration number. Note that in Italy many first instance judgments do not have a case number and are identified by the names of the parties)
Hard copy publication: Not yet published, but will be published in *Rivista Italiana di Diritto del Lavoro* no 2 2011
Internet publication: see www.eelc-online.com

EELC 2011/16

The (central) works council of French subsidiaries must be informed of a foreign parent company merger project

COUNTRY FRANCE

CONTRIBUTOR DAVID JONIN AND FRANCIS KESSLER, GIDE LOYRETTE NOUEL A.A.R.P.I., PARIS

Summary

The French *Cour de cassation*[1] recently handed down a decision that increases French works council involvement in mergers where the decision-making is carried out at a higher level within the group, such as by the parent company. When a parent company located in The Netherlands and a US company were involved in a merger operation, the (central) works council ("CWC") of the former's French subsidiaries should have been informed, in compliance with the combined provisions of EC Regulations 802/2004 and 139/2004 relating to the control of mergers between undertakings and of Articles L.2323-1 and L.2323-20 of the French Labour Code, insofar as all the economic entities are either directly or indirectly affected by the acquisition of sole or joint control. The decision has wide-ranging implications for both French and international groups with subsidiaries in France.

Facts

The Dutch legal entity Organon BioSciences NV had two French subsidiaries, Organon SA and Diosynth. Pursuant to French case law, these subsidiaries were considered to form a social and economic unit[2]. In March 2007, Schering Plough, a US company, initiated a public takeover bid of Organon BioSciences NV and notified the contemplated merger of activities to the Directorate-General of Competition of the European Commission[3]. On 18 September 2007, in accordance with the provisions of Article L.2323-20 of the Labour Code, the CWC decided to seek the assistance of a chartered accountant with a view to examining the proposed takeover (at the expense of Organon SA and Diosynth). Organon SA and Diosynth challenged the appointment of a chartered accountant, stating that as they were not parties to the merger itself, the provisions of Article L.2323-20[4] did not apply and the CWC was therefore not entitled to appoint an accountant in respect of the operation. They argued that only the entities that were actual parties to the legal transaction should be considered parties to the merger operation, i.e. in this particular case, the acquiring US company and the Dutch company being acquired. They maintained that subsidiaries should not be considered as parties simply because they could potentially be affected by the operation in the long term. The court of first instance found in favour of the CWC and, in a judgment dated 14 January 2009, the Appeal Court of Versailles stated that the CWC had a right to specific information as soon as the French subsidiaries could be affected by the planned merger.

Judgment

The *Cour de cassation* rejected the strict interpretation upheld by the French companies, affirming that the relevant European and French texts show that *"all economic entities affected either directly or indirectly by the acquisition of sole or joint control are parties to the merger operation"*. Hence, as the projected merger operation would eliminate one of the market participants and have an impact on the situation of the employees of the indirectly targeted companies, *"the Court of Appeal has ruled, without its judgment being vitiated in the manner alleged in the pleadings, that these companies were parties to the operation and that the CWC of the economic and social unit that they form had grounds to seek the assistance of a chartered accountant to examine the proposal"*.

Article L.2323-20 of the Labour Code had left room for doubt as to the scope of the information process. Granted, while it was acknowledged that, by referencing Article L.430-1 of the Commercial Code[5], the Labour Code referred to merger operations involving independent companies and acquisitions of sole or joint control, this did not establish to what extent an entity of the group was to be considered a *"party to a merger operation"*.

In line with Appendix I of Regulation 802/2004, regarding the content of the merger notification form, the French *Cour de cassation* had found a credible legal basis to support a broad interpretation of the notion of *"party/ies to a merger"* as being *"both the party/ies that acquire and those that are acquired, or the parties that merge, including all companies in which a controlling interest is acquired or that are the object of a public takeover bid"*. This offered a favourable solution for the CWC.

Commentary

First and foremost, the debate concerning the definition of "party to a merger" is now closed[6]. The French *Cour de cassation* has integrated the fact that the employees' right to be informed and consulted is part of their fundamental rights – a fact supported by Directive 2002/14/EC of 11 March 2002, which established a general framework for the information and consultation of workers in undertakings within the European Community. It is important to recall that in accordance with this Directive, the information and consultation process' scope is broad, including: information on the recent and probable development of the company's or establishment's activities and its economic situation; information and consultation on the situation, structure and probable evolution of employment within the company or establishment, as well as any potentially contemplated measures of anticipation, notably where there may be a threat to employment; information and consultation on the decisions liable to cause important changes to the organisation of work or in the employment contracts. Moreover, the Directive requires that *"information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employee representatives to conduct an adequate study and, where necessary, prepare for consultation"*. Likewise, Article L.2323-19 of the Labour Code provides that *"in the economic order, it is mandatory to inform and consult the works council on issues that concern the organisation, management and general running of the company and notably on measures liable to affect the volume or structure of the headcount, working time, employment conditions and professional training"*. The importance of the information and consultation process and the need to guarantee its useful effect is supported by the ECJ, which notably condemned the French regulations that imposed on certain employers duties provided by Directive 2002/14, and deprived workers (those under 26 years of age) of recognised information and consultation rights[7].

It therefore makes sense that, in accordance with EU law, the French *Cour de cassation* itself has attached great value to the information and consultation process, having recently interpreted several provisions of the Labour Code in light of Directive 2002/14[8].

In practice, a French company's management may have difficulty in answering questions from the (central) works council concerning a merger, as this may be taking place at a significantly higher level within the group. In addition, aside from the issue of the cost of acceding to the accountant's information access request, actually responding to information requests and obtaining the relevant documents may not be easy, in particular with respect to information concerning the other group. However, the argument that a French company does not hold the information itself is not generally accepted by French courts. The company must do its utmost to obtain the requested information, and it is likely that the courts will consider this to be possible within the group to which it belongs.

(Footnotes)

1 French Supreme Court, see Hastings F, *"Droit du travail Concentration: rôle renforcé pour les comités d'entreprise de filiales françaises"*, *La Tribune.fr* 08/12/2010.

2 *"Unité économique et sociale"* – a social and economic unit should not be considered as a single company, but should be seen as the organised representation of employees from various companies pertaining to the same group. For example, see Royle, T, "Worker Representation Under Threat? The McDonald's corporation and the effectiveness of statutory works councils in seven European countries", Comparative Labour Law & Policy Journal 2005 Vol 22:392.

3 Pursuant to Dutch law, Organon BioSciences was required to seek the advice of its works council regarding the planned acquisition by Schering-Plough. That council issued its initial advice on 27 July 2007, which was positive, subject to various conditions. With the satisfactory conclusion of subsequent discussions among Organon BioSciences, the Dutch works council and Schering-Plough, and the expiration of a mandatory waiting period, the works council declined to take any formal action relating to the transaction. As a result, the requirements of Dutch law relating to the completion of the consultation procedures with Organon BioSciences' works council were met and the corresponding condition to the transaction proceeding was satisfied.

4 Whereby *"where a company is party to a merger operation as defined in Article L.430-1 of the Commercial Code, the head of the company summons the works council within three days at the latest of the publication"*.

5 In accordance with this text, a merger is an operation whereby two or more previously independent undertakings merge together, or one or more undertakings (or one or more persons already controlling at least one undertaking) acquire the direct or indirect control of one or more other undertakings, or where certain joint ventures are created. The French merger control regime is set out in Articles L.430.1 and seq. of the Commercial Code, as amended by the Modernisation of the Economy Act ("LME") of 4 August 2008.

6 Olczak-Godefert, G, *"L'information du CE en cas d'opération de contrôle des concentrations"*, *Semaine sociale Lamy* 2010 no 1467, p.11.

7 ECJ, 18 January 2007, case C-385/05, *CGT et al. – v – Premier Ministre, Ministre de l'Emploi, de la Cohésion sociale et du Logement.*

8 *Cour de cassation*, Employment Div, 18 December 2007, no 06-17389; 15 December 2009, no 08-17722; *Cour de cassation*, Employment Div, 12 September 2007, no 06-13667.

Subject: Right of information of the (central) works council during a merger operation
Parties: *Organon SA, Diosynth and Schering-Plough – v – (central) works council of the economic and social unit between Organon and Diosynth*
Court: *Cour de cassation*, *Chambre sociale* (Employment Division)
Date: 26 October 2010
Case number: no 09-65565
Internet publication: www.legifrance.gouv.fr

2011/17

Portuguese judgment highlights distinction between regular dismissal and probationary termination

COUNTRY PORTUGAL

CONTRIBUTOR CARMO SOUSA MACHADO AND MADALENA VIANA PEDREIRA, ABREU ADVOGADOS, LISBON

Summary
If the parties to an employment agreement are silent on a probationary or notice period, they must be deemed to have agreed to a probationary period of 90 days, during which the employee lacks protection against termination.

Facts
The defendant, the owner of a restaurant, hired the plaintiff as a Food & Beverage Manager, starting on 1 September 2009. The parties did not put their agreement in writing. On Saturday 21 November 2009, following an incident at work, the plaintiff was told to leave. He asked whether he was being dismissed and, if so, whether he would be receiving a document evidencing his dismissal, which would enable him to collect unemployment benefits. He was told to come back on Monday, when he would be given this document.

When the plaintiff returned on Monday, he said he did not accept his dismissal, that he was coming to work and that he refused to leave. In the end, the police were called in to evict him from the premises. He brought legal proceedings, claiming that his dismissal was unlawful, as the procedure for dismissal required under Portuguese law had not been followed. Accordingly, he demanded payment of his salary and fringe benefits for the period between 1 and 21 November 2009 (which had not been paid), salary from 21 November 2009 until such date as his employment would have validly terminated and compensation in lieu of reinstatement in the amount of three months' salary.

The employer's defence was that the plaintiff had not been dismissed, but had been terminated during his probationary period. The court accepted this defence and awarded only a small portion of the plaintiff's claim. He appealed.

Judgment
The Court of Appeal held that, as there was no evidence that the parties had made an agreement (verbally or otherwise) in respect of a probationary or notice period, the statutory probationary period of 90 days and the statutory notice period of (in this case) seven days applied. Therefore, given that the plaintiff's employment had lasted just under 90 days, the dismissal was deemed to be a termination during the probationary period and the plaintiff was merely entitled to his salary up until 21 November 2009 and compensation in lieu of seven days' notice.

Commentary
This judgment received a fair amount of publicity in Portugal, as it highlighted the distinction between dismissal and termination during a probationary period.

Comments from other jurisdictions
Austria (Martin E. Risak): Under Austrian law, a probationary employment relationship that can be terminated by either party without notice and without giving reasons must be agreed upon in the employment contract or provided for in the collective bargaining agreement. In general, it is limited by statute to the first month of the employment relationship. In practice, most employment contracts contain such a clause.

Finland (Karoliina Koistila): Under Finnish law, the employer and employee must explicitly agree to a probationary period (or refer to such a condition in an applicable collective bargaining agreement) in order for it to apply. Further, if the employment is for less than eight months, the probationary period may at most be for half the duration of the employment. In addition, there is no notice period for termination during a probationary period.

France (Claire Toumieux & Susan Ekrami): French judges would not have ruled similarly in such circumstances. Indeed, Article L.1221-23 of the French Labour Code expressly provides that "*The trial period and the possibility of its renewal cannot be presumed. It is expressly stipulated in the commitment letter or the employment contract*".

Therefore, the probationary period should be confirmed in writing, both in its principle and duration, from the very beginning of the employment contract. Furthermore, the employee must give his or her consent to such a probationary period by signing the employment contract, otherwise it is unenforceable against the employee and termination of the employment during such a period will amount to a dismissal.

Germany (Paul Schreiner): In Germany, the parties to an employment contract must explicitly agree on a probationary period, otherwise the employment relationship is deemed not to have one. The probationary period under German law has only one consequence, which is that a notice period of two weeks applies instead of the normal notice period during the first two years of employment, which is four weeks to the 15th of each month or to the month end.

However, the German Unfair Dismissal Protection Act only applies after a period of six months, unless the parties agree otherwise. Therefore, in essence the situation in Portugal is comparable to the one in Germany, as far as the treatment of the dismissal (without regard to the notice period) is concerned.

Subject: Termination during probationary period
Parties: identities not known
Court: *Tribunal da Relação do Porto* (Court of Appeal, Oporto)
Date: 10 January 2011
Case number: JTRP 000
Internet publication: www.dgsi.pt

ECJ COURT WATCH

SUMMARIES BY PETER VAS NUNES

ECJ 1 October 2010, case C-3/10 (*Franco Affatato – v – Azienda Sanitaria Provinciale di Cosenza*) ("**Affatato**"), Italian case (FIXED-TERM WORK)

Facts

Mr Affatato was employed by a public health authority in Italy and was given six consecutive fixed-term contracts. When the last of these expired on 20 June 2003 he was not given a further contract and therefore lost his job. He brought an action before the local court, seeking (i) conversion of his last fixed-term contract into a permanent contract, (ii) reinstatement and (iii) payment of his salary from 21 June 2003. He based his claim on the fact that none of his six contracts had specified the reason that it was temporary rather than permanent, despite the fact that Italian law (Decree 368/2001), as it read in the relevant period, provided that a fixed-term contract may only be entered into for technical reasons or for reasons of production, organisation or replacement, in the absence of which reasons the fixed-term clause is invalid, i.e. the contract is permanent. The defendant admitted that the reason for not offering Mr Affatato a permanent contract was not technical or in relation to production, organisation or replacement, but purely that the defendant was prohibited by financial legislation from offering permanent employment. However, the defendant pointed out that in 2001 parliament had passed Decree 165, which, *inter alia*, provided in Article 36(5) that in the public sector a fixed-term contract can never convert into a permanent one. It also provided that a worker wrongly taken on for a fixed term is eligible to receive compensation, for which the individual responsible for hiring the worker may, under certain circumstances, be personally liable.

National proceedings

The court doubted whether Article 36(5) is compatible with the Framework Agreement implemented by Directive 1999/70. It therefore found it necessary to refer 16 questions to the ECJ. Questions 1-12 related to certain special categories of workers (e.g. postal workers and teachers). Questions 13 and 14 asked whether Clause 5 of the Framework Agreement precludes a national law that makes it impossible for a fixed-term contract to convert into a permanent one. Questions 15 and 16 asked how strongly a Member State must penalise abuse of fixed-term contracts.

ECJ's ruling

1. The ECJ considers questions 1-12 to be hypothetical and irrelevant to the main proceedings, for which reason they are not receivable and remain unanswered (§ 24-33).
2. Questions 13 and 14 have already been answered in the ECJ's rulings in *Adeneler, Marrosu, Vassallo, Angelidaki, Vassilakis, Koukou* and *Lagoudakis*. As is apparent from those judgements, Clause 5 of the Framework Agreement does not require the Member States to provide for the conversion of fixed-term contracts into permanent ones, neither does it require them to provide in detail under which conditions fixed-term contracts may be used. Point 2(b) of Clause 5 merely provides that the Member States, *"where appropriate"* must determine under what conditions fixed-term contracts must be deemed to be contracts of indefinite duration. Thus, there is no obligation to treat workers in the private and public sectors in the same way. Moreover, Clause 5 does not impact the Member States' fundamental political and constitutional structures as provided in Article 4(2) TEU (§ 36-41).
3. If a national law prohibits the conversion of fixed-term contracts in the public sector, the Member State in question must provide for an effective measure to avoid and, where necessary, penalise the abuse of consecutive fixed-term contracts. Where, as in this case, EU law lacks specific sanctions against abuse, the Member States must adopt measures that are proportionate, effective and dissuasive to guarantee the principles laid down in the Framework Agreement. Although it is up to the Member States to determine what such measures are, they must be no less favourable than those governing similar situations (equivalency principle) and must not be such as to render the exercise of the rights bestowed by the Framework Agreement impossible or excessively difficult (effectiveness principle), as mandated by Article 2 of Directive 1999/70 (§ 42-47).
4. It would appear that the Italian legislation in question complies with these principles, but it is up to the domestic courts to determine whether this is truly the case (§ 48-50).
5. The criteria for determining whether a sanction against the abuse of fixed-term contracts is adequate must be determined in accordance with domestic law. The national courts must apply the equivalency and effectiveness tests (§ 52-62).
6. **Ruling**: Clause 5 of the Framework Agreement does not preclude national legislation, such as Article 36(5) of Decree 165, prohibiting conversion of fixed-term contracts into permanent contracts, where the legal order of that Member State contains other effective measures to avoid and, as necessary, penalise the abusive use of successive fixed-term contracts. It is for the national courts to assess to what extent such measures are adequate, provided they are not less favourable than those governing similar situations and that they do not make it impossible or excessively difficult to exercise the rights conferred by EU law.

ECJ 21 October 2010, case C-227/09 (*Antonino Accardo and others – v – Comune di Torino)* ("**Accardo**"), Italian case (WORKING TIME)

Facts

Mr Accardo and his 64 co-plaintiffs were police officers in the employment of the city of Turin. In the period 1998 to 2007 they worked in shifts, which involved working seven consecutive days once every five weeks. This shift system was based on a collective agreement. The plaintiffs brought proceedings against their employer seeking compensation for psychological and physical harm suffered as a result of failure to comply with Article 36(3) of the Italian Constitution and Article 2109(1) of the Civil Code, both of which grant employees at least one day of rest per week and which override the collective agreement in question.

National proceedings

The court decided to ask the ECJ for clarification on Article 17(3) of Directive 93/104, which is one of the directives implementing Framework Directive 89/391 on occupational safety and health. Directive 93/104 was amended by Directive 2000/34 and was later, with effect from 2 August 2004, replaced by Directive 2000/88. Directive 93/104, amended Directive 93/104 and Directive 2000/88 are referred to below as "the Directive". The court asked four questions. The first three questions had to do with the fact that Article 17 of the Directive permits Member States to do something that is prohibited by Italian law (i.e. to derogate from the weekly day of rest), namely by its Constitution and Civil Code. Could the city of Turin nonetheless rely on Article 17 of the Directive against the plaintiffs? The fourth question addressed the relationship between Articles 17(2) and 17(3) of the Directive.

ECJ's ruling

1. The ECJ begins by answering the fourth question. Article 17(2) allows the Member States to derogate from certain working time rules, provided the workers concerned are afforded equivalent periods of compensatory rest or appropriate protection. This applies to cases of security and surveillance activities (item b) and activities involving the need for continuity of service, such as those of ambulance, fire and civil protection services (item c). Article 17(3) allows derogation, with the same proviso as paragraph 2, by means of collective agreements. The plaintiffs concluded that Article 17(3) does not permit derogations that are broader in scope than those permitted under Article 17(2). The ECJ disagrees, given that there is nothing in the wording or the history of the Directive in support of this contention (§ 30-36).
2. As for question 1, the ECJ observes that a Member State that has not transposed the Directive's derogation provisions cannot rely on its own failure to do so in order to refuse individuals' entitlement to a weekly rest period to which domestic law entitles them. Therefore, the city of Turin cannot rely directly on the Directive against the plaintiffs (§ 44-47).
3. Although national courts must interpret their domestic law in line with EU law, since the derogation provisions of the Directive are optional, the Directive cannot be interpreted as precluding the applicability of domestic law (in this case, the collective agreement) (§ 48-54).
4. Where EU law gives Member States the option to derogate from certain provisions of a directive, those Member States must exercise their discretion in a manner that is consistent with the principles of EU law, including the principle of legal certainty. To that end, provisions that permit optional derogations from the rules laid down by a directive must be implemented with the requisite precision and clarity to satisfy the requirements flowing from that principle (§ 55).
5. This means that the referring court is faced with two alternatives: either (i) the collective agreement does not comply with the principle of legal certainty or the requirements under Italian law for implementing the derogating provisions or (ii) it constitutes the correct implementation of the Directive's derogating provisions. In the first case, if Italian law precludes application of the collective agreement, the Directive cannot be relied on against the plaintiffs. In the second case, the Directive does not preclude the referring court form interpreting Italian law to the effect that the city of Turin may rely on the collective agreement (§ 56-58).
6. **Ruling**: the fact that a profession is not listed in Article 17(2) of the Directive does not mean that it may not be covered by the derogation provided in Article 17(3). In circumstances such as those in the case of Mr Accardo, the optional derogations provided in Article 17 of the Directive cannot be relied on against Accardo at all. They cannot be interpreted as permitting or precluding the application of collective agreements such as the one in question, since whether such collective agreements apply is a matter for domestic law.

ECJ 11 November 2010, case C-20/10 (*Vino Damiano – v – Poste Italiane SpA*) ("**Vino**"), Italian case (FIXED-TERM WORK)

Facts

Until 1987, Italian law did not allow fixed-term employment contracts except for certain specific reasons. In 1987, the law was relaxed somewhat by allowing collective agreements to provide that a fixed-term contract may be concluded without giving a reason, provided that no more than a certain percentage of the workforce was employed on the basis of such a contract. In 1994, and again in 2001, the Italian Postal Service ("*Poste Italiane*") entered into collective agreements with the relevant unions, which authorised it to employ a maximum of (initially) 10% and (then) 5%, respectively, of its workforce for a fixed term.

Italy transposed Directive 1999/70 in 2001 by means of Law 368/2001. It provides that workers may only be hired for a fixed term for technical, production or organisational reasons or in order to replace another temporarily absent worker, such reason to be specified in writing. On 1 January 2006, a new provision (Paragraph 2(1bis)) was added to Law 368/2001, for budgetary reasons. It allows postal service companies to hire workers for a maximum duration of six months (in summer) or four months (at any time of the year) without providing any reason, up to a maximum of 15% of the workforce.

Poste Italiane hired Mr Vino for a fixed term from 1 April to 31 May 2008. It gave no reason for offering a fixed term rather than a permanent contract. Mr Vino applied to the local court, seeking a declaration that his contract was unlawful.

National proceedings

The court was uncertain whether Paragraph 2(1bis) is compatible with the Framework Agreement implemented by Directive 1999/70 ("The Framework Agreement"), in particular Clause 8(3), which provides that *"Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement"*. It noted that Paragraph 2(1bis) reduced the level of protection previously enjoyed by workers without introducing any compensatory measures. This reduction was not limited to any particular category of workers, given that *Poste Italiane* hired over 21,000 fixed-term workers in 2008, during which time it had approximately 147,000 permanent workers. The court also had other doubts regarding the compatibility of Paragraph 2(1bis) with the Framework Agreement.

ECJ's ruling

1. The ECJ begins by noting that it had already answered questions 1, 2 and 6 in previous rulings (*Mangold, Angelidaki, Sorge* and *Koukou*) by holding that Clause 8(3) of the Framework Agreement does not prohibit any reduction in the level of protection of fixed-term workers, only such reductions that (i) form part of an implementation of the Framework Agreement and (ii) reduce the general level of protection (§ 27-35).
2. As already held in *Mangold*, Clause 8(3) of the Framework Agreement, where it refers to *"implementation of this agreement"*, relates not merely to the initial transposition of the Directive but covers all domestic legislation intended to ensure that the objective pursued by the Directive may be attained. This includes legislation that, after transposition in the strict sense, adds to or amends domestic rules previously adopted. However, such legislation cannot be regarded as conflicting with Clause 8(3), if the reduction it entails is in no way connected to the implementation of the Framework Agreement – for example, if the reduction is justified not by the need to put the Framework Agreement into effect, but by the need to encourage another objective, one that is distinct from that implementation. It is clear that the removal of the duty on employers such as *Poste Italiane,* to specify an objective reason for hiring someone for a fixed term, does not result from the adoption of Law 368/2001. On the contrary, that removal was enacted for budgetary reasons and to increase the postal services' efficiency in

the light of Directive 97/67 on postal services (§ 36-42).
3. There is no indication that the removal reflected a desire by the legislature to revisit the transposition of the Framework Agreement and thus to create a new balance between the rights of employers and employees. Therefore, Paragraph 2(1bis) cannot be considered as being linked to the implementation of the Framework Agreement, and it is not incompatible with Clause 8(3) of the Framework Agreement. Given this fact, there is no need to investigate whether Paragraph 2(1bis) reduced the *"general level of protection"* (§ 43-48).
4. The Framework Agreement prohibits discrimination between permanent workers and fixed-term workers, but only in respect of their terms of employment. The discrimination resulting from the duration of the employment itself is not caused by any EU legislation, so that the ECJ has no jurisdiction to rule on it (§ 49-65).
5. The referring court's fifth question related to *Poste Italiane's* monopoly position. This aspect of the case is not relevant to EELC.
6. **Ruling**: Clause 8(3) of the Framework Agreement does not preclude a national measure such as Paragraph 2(1bis).

ECJ 22 December 2010, joined cases C-444/09 *(Rosa Maria Gavieiro Gavieiro)* **and C-459/09** (*Ana María Iglesias Torres*) (*both: – v – Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia)* ("**Gavieiro**"), Spanish case (FIXED–TERM WORK)

Facts

These cases concern two teachers who were employed by a public body (the *"Consellería"*) in the Spanish autonomous community of Galicia. The cases relate to Directive 99/70, which put into effect the Framework Agreement on Fixed-Term Work (the "Directive"). Clause 4(1) of the Framework Agreement provides that, in respect of employment conditions, fixed-term workers must not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or employment relationship, unless different treatment is justified on "objective grounds". Clause 4(4) stipulates that the equal treatment requirement covers period-of-service qualifications. The deadline for transposing the Directive expired on 10 July 2001.

Until 13 May 2007, the Spanish and Galician laws relating to civil servants entitled permanent civil servants, but not temporary ones, to three-yearly length of service salary raises ("increments"). On 12 April 2007, in the *Del Cerro Alonso* case (case C-307/05) the ECJ held this distinction to be incompatible with the Directive. Very shortly afterwards, Spain passed a law known as the "LEBEP", which made temporary civil servants eligible for the same increments as their permanent colleagues. However, the LEBEP provided that increments corresponding to periods of service preceding the date on which the LEBEP took effect, which was 13 May 2007, would only take effect from that date, i.e. there was no retroactive effect.

National proceedings

Both teachers applied for retroactive increments and, when these were refused, sought judicial redress. In the case of Ms Gavieiro, the court to which she applied referred one question to the ECJ. The other court to which Ms Torres applied asked four (different) questions.

ECJ's ruling

1. In reply to the first question, the ECJ recalled its previous rulings that the Directive applies equally to private and public sector bodies. It added that the Directive implements the principle of equal treatment, which is a *"principle of general application"* (§ 36-45).
2. The next question asked (i) how to interpret *"different length-of-service qualifications"* in Clause 4(4) of the Framework Agreement and (ii) whether the temporary nature of the employment of certain public servants is, in itself, an objective justification within the meaning of that Clause. The ECJ noted that in its *Del Cerro* judgment it had already held that a length-of-service payment identical to that in the present case is covered by Clause 4 of the Framework Agreement, which articulates a principle of EU social law and therefore cannot be interpreted restrictively (§ 45-50).
3. As already held in *Del Cerro*, a difference in treatment between permanent and temporary workers cannot be justified by a general, abstract national norm, such as a law or a collective agreement (§ 54), nor can the mere fact that someone's employment is temporary justify paying him or her less (§ 55-57).
4. The next question was whether the LEBEP is to be regarded as a national measure transposing the Directive, given that the LEBEP makes no reference to the Directive or, indeed, to any EU law. Article 2 of the Directive provides that when Member States adopt the laws, regulations and administrative provisions necessary to comply with that Directive, these are to contain a reference to the Directive. However, if a national law fails to make such a reference, that in itself does not preclude the law from being a valid measure of transposition (§ 60-63). Whether the LEBEP actually is a measure transposing the Directive is up to the Spanish courts to determine (§ 64-66).
5. The next question was whether an individual may rely on the direct (vertical) effect of the Directive in the period between the transposition deadline (in this case, 10 July 2001) and the date on which it was transposed (in this case, 13 May 2007). The Spanish government suggested a negative answer, arguing that once a directive has been transposed into domestic law, an individual may no longer rely on its direct effect. In this case, Ms Gavieiro and Ms Torres had brought their case before the court after Spain had transposed the Directive. The Spanish government argued that, therefore, they could not invoke its direct effect. The ECJ disagreed with this view, noting that *"the principle of effective legal protection is a general principle of EU law recognised, moreover, in Article 47 of the Charter of Fundamental Rights of the European Union"*, and that it is the responsibility of the national courts to provide such protection (§ 75).
6. Clause 4 of the Framework Agreement is unconditional and sufficiently precise to be relied upon by individuals. The argument that the autonomous community of Galicia had no choice but to follow Spanish law is of no relevance (§ 76-89).
7. The final question was whether the Spanish authorities were obliged to give the Directive retroactive effect, given the ECJ's ruling in the *Impact* case (case C-268/06). In that ruling the ECJ held that, in so far as a national law precludes retroactive application of legislation, a national court hearing a claim based on an infringement of a provision of national legislation transposing Directive 1999/70, must give that provision retroactive effect only if the national legislation makes this possible. The *Impact* case, however, dealt with a different issue. In the case of Ms Gavieiro and Ms Torres, they were subject to discrimination during the entire period up until 13 May 2007, and they relied on a provision of EU law

having direct effect in order to compensate for a *lacuna*, which the incorrect transposition of Directive 1999/70 had allowed to subsist in Spanish law.

8. **Ruling**: interim civil servants fall within the scope of Directive 1999/70, which covers length-of-service increments. The lack of a reference to the Directive in domestic law does not preclude that law from constituting a measure of transposition. Clause 4 of the Directive is unconditional and sufficiently precise for individuals to rely on it in the period from the transposition deadline, with retroactive effect.

ECJ 18 January 2011, case C-272/10 *(Souzana Berziki-Nikolakaki – v – ASEP and Aristoteleio Panepistimio Thessalonikis)* ("**Berziki**"), Greek case (only Greek and French versions) (FIXED-TERM WORK)

Facts

Ms Berziki was employed as a full-time microbiologist by the University of Thessaloniki on the basis of five consecutive fixed-term contracts, the fifth of which ran from July to December 2004. On 19 July 2004, the Greek law transposing Directive 1999/70 on fixed-term work, Presidential Decree 164/2004 ("the Decree"), which was published in the Greek Official Gazette, came into effect. This was more than two years after the transposition deadline (10 July 2002) had expired. Presidential Decree 164/2004 limits the use of fixed-term contracts in accordance with the Framework Agreement implemented by Directive 1999/70 ("the Directive"). This case concerns the transitional provisions of the Decree, as provided in Article 11. Article 11(1) of the Decree provided that fixed-term contracts that were in force on 19 July 2004 or had expired less than three months previously, converted into permanent contracts, if certain conditions were satisfied. Article 11(2) provided that an employee who believed that he or she satisfied these conditions had to inform the relevant authority (in this case, the "ASEP") in writing within two months of 19 July 2004, i.e. no later than 19 September 2004. Failure to do so would lead to the loss of the conversion into permanent employment.

Ms Berziki applied for conversion of her (fifth) fixed-term contract on 15 October 2004. The ASEP turned down her application on the basis that it had been submitted too late, namely after the 19 September 2004 deadline. Ms Berziki applied to the local court, seeking to annul the ASEP's decision.

National proceedings

The court found it necessary to refer three questions to the ECJ, given the fact that the two-month deadline is shorter than similar deadlines in domestic Greek law and that many of the persons eligible to take advantage of the Decree had not read its publication in the Official Journal in time. The first two questions essentially asked whether the Decree was compatible with the Directive. The third question related to Clause 8(3) of the Framework Agreement, which provides that implementation of that agreement does not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.

ECJ's ruling

1. The ECJ recalls that it already answered the first two questions in its rulings in the cases of *Angelidaki* (C-378/07), *Vassilakis* (C-364/07) and *Koukou* (C-519/08). In those cases, the ECJ held that the conditions imposed by the Decree for conversion of a fixed-term contract into a permanent one are not, in principle, incompatible with the Directive. It also held that it is up to the national courts to determine whether the measures laid down in Article 11 of the Decree are appropriate for the purpose of punishing any misuse of fixed-term employment contracts that took place between 10 July 2002 and 19 July 2004 (*Angelidaki* § 171), provided that those measures bestow an effective protection against such misuse (§ 29-36).
2. The means that an employee has at his or her disposal to exercise rights under the Directive must not be inferior to those that he or she has to exercise similar rights under domestic law (equivalency principle). The means must not be such as to render the exercise of those rights impossible or excessively difficult (effectiveness principle). In this regard, the referring court noted that in the past the Greek legislature had systematically extended deadlines for exercising similar rights under domestic law. However, those extensions are no longer in effect, and the referring court mentions no other facts indicating a more favourable treatment of claims under domestic Greek law as compared to claims under the Directive. Thus, the equivalency principle does not seem to have been breached (§ 37-41).
3. As for the effectiveness principle, a period of two months is sufficient (§ 48-55).
4. It is up to the Greek courts to determine whether publication of the Decree in the Official Gazette is sufficient to initiate the two-month deadline (§ 56-59).
5. As for the third question, the ECJ already provided an answer in previous rulings, including *Mangold, Angelidaki, Sorge, Koukou* and *Vino*. In those rulings, the ECJ held that a reduction as provided in Clause 8(3) of the Framework Agreement must (i) be linked to the implementation of that agreement and (ii) relate to "*the general level of protection*". These conditions have not been met (§ 62-77).
6. **Ruling**: the Decree is not incompatible with the Directive.

ECJ 20 January 2011, case C-463/09 *(CLECE SA – v – María Socorro Martín Valor and Ayuntamiento de Cobisa)* ("**CLECE**"), Spanish case, opinion A-G Trstenjak in EELC 2010/4 p47 (TRANSFER OF UNDERTAKING)

Facts

"CLECE" is a cleaning company that had contracted with the municipality of Cobisa to clean certain municipal buildings. It did not make use of special equipment to carry out the contract. The municipality decided to perform the cleaning services itself (by contracting in) and terminated its contract with CLECE's cleaners, instead hiring temporary agency workers to perform the cleaning work.

CLECE informed its cleaners that they had transferred into the employment of the municipality as of 1 January 2008. The municipality, however, took the opposite view. One of the cleaners, Ms Valor, took legal action against both CLECE and the municipality, claiming that she had been wrongfully dismissed. She based her claim on the collective agreement for the cleaning industry, which contained a provision setting out the consequences of contracting in.

National Proceedings

The court of first instance found that the collective agreement was not binding on the municipality, against which a claim could therefore not be made. It held that Ms Valor had been unlawfully dismissed by CLECE, which was ordered (i) to pay her salary from 1 January 2008 and (ii) to either reinstate her or pay her approximately € 6,500 in compensation. CLECE appealed.

The Court of Appeal agreed with the court of first instance that Ms Valor's claim could not be based on the collective agreement. However, the court considered that the contracting in could perhaps constitute a transfer of undertaking pursuant to (the Spanish law transposing) the Acquired Rights Directive 2001/23. It asked the ECJ for clarification.

ECJ's ruling

1. The fact that the party to whom an activity is transferred is a public law body does not prevent the Directive from applying (§ 25-27).
2. The Directive's scope is to be determined having regard to its objective, which is to safeguard employees in the event that their undertaking is transferred (§ 29).
3. The Directive is capable of applying to a contracting-in situation, provided the economic entity retains its identity (§ 30-33).
4. In order to determine whether such an entity retains its identity one must apply the *Spijkers* criteria, namely: the type of business; the tangible assets; the value of intangible assets; whether the new employer takes over the majority of the employees; whether customers are transferred; the degree of similarity between the activities pre- and post-transfer; and the period, if any, during which those activities were suspended. Each of these circumstances are merely single factors in the overall assessment, so that they cannot be considered in isolation (§ 34).
5. Inasmuch as, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred, where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by its predecessor to that task (§ 35-36).
6. It is not necessary for the transferor and the transferee to have negotiated a contract, a unilateral decision by the former employer being sufficient to trigger a transfer of undertaking (§ 37-38).
7. A group of employees who are permanently assigned to the common task of cleaning may amount to an economic entity (§ 39).
8. Given that the municipality of Cobisa took over neither assets nor staff from CLECE, the only link between CLECE and the municipality is the activity, which is identical. This fact alone does not lead to the conclusion that an economic activity has retained its identity. The identity of an entity that is essentially based on manpower cannot be retained, if the majority of its employees are not taken on by the alleged transferee (§ 40-41).
9. **Ruling**: the Directive does not apply in a situation such as in this case.

ECJ 10 February 2011, case C-30/10 *(Lotta Andersson – v – Staten genom Kronofogdemyndigheten i Jönköping*) ("**Andersson**"), Swedish case (INSOLVENCY)

Facts

Mr and Mrs Andersson each owned half of the shares of "Linköpings Ridskola AB". Mrs Andersson acquired her shares as a gift from her husband, who was the sole director. She was an employee and a deputy director. In November 2008, her husband withdrew her authority as a sole signatory on behalf of the company. One month later, the company was declared insolvent and an insolvency administrator was appointed. He refused to pay Mrs Anderson's salary for the month of December 2008 and for her notice period. Mrs Andersson took the matter to court, claiming that she was entitled to payment on the basis of the Swedish law transposing Directive 80/987, which was replaced in November 2008 by Directive 2008/94. These Directives provide that the Member States must establish guarantee institutions that pay or guarantee the employees of insolvent employers their salaries and certain benefits for a certain period of time. Article 10(c) of the old Directive and Article 12 of the new Directive allow the Member States to provide for an exemption from this protection in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer's business and had a considerable influence on its activities. Swedish law contains such an exemption, with this addition that it exempts individuals who owned an essential part of the business and had a considerable influence on its activities "more recently than six months before the application for a declaration of insolvency".

National Proceedings

The referring Swedish court wished to know whether the six-month provision is compatible with the relevant Directives.

ECJ's ruling

The ECJ replied in the affirmative. Article 12(c) of Directive 2008/94 does not preclude a provision of national law that excludes an employee from entitlement under the guarantee of payment on the grounds that the employee, alone or together with close relatives, within the six months preceding the application for a declaration of insolvency, was the owner of an essential part of the business and had a considerable influence on its activities.

ECJ 10 February 2011, joined cases C-307 through 309/09 (*Vicoplus SC PUH, BAM Vermeer Contracting Sp.zoo and Olbek Industrial Services Sp. zoo (***"Vicoplus"**), Dutch case (FREE MOVEMENT)

Facts

Dutch law requires companies to have a work permit in order to employ non-EU nationals. There is an exception to this rule where a European company performs services in The Netherlands and for that purpose makes use of a non-EU national who is entitled to work in that company's home country. This exception was introduced in order to comply with Articles 56 and 57 TFEU (formerly Article 49 EC), as interpreted by the ECJ in a number of cases, including *Rush Portuguesa* (C-113/89) and *Van der Elst* (C-43/93). Article 56 TFEU prohibits restriction of freedom to provide services within the EU. Article 57 TFEU defines "services" broadly. However, the exception in relation to the Dutch work permit requirement does not apply to temporary employment agencies. This exception to the exception is referred to below as "the Temporary Agency Exception".

In the course of 2005 and 2006, the Dutch Labour Inspectorate discovered that Polish "temps" were performing work in a number of companies. These Polish workers were employed by Polish temporary agencies, which had hired them out to the Dutch user companies. The Polish temporary agencies (and, presumably, the Dutch user companies) were fined.

At that time, although Poland was already a Member State, having acceded to the EU in 2004, a number of transitional provisions were still in place. One of these (paragraph 2 of Chapter 2 of Annex XII to the 2003 Act of Accession, "Para 2(2) Annex XII") provided that the freedom of movement pursuant to Regulation 1612/68 would not apply to Polish workers for a certain period of time. For this reason, Polish workers were equated to non-EU nationals for the purpose of free movement and therefore Dutch companies wishing to employ Polish workers needed a work permit.

National Proceedings

The Polish temporary agencies appealed against the fines they were ordered to pay. They lost in two instances. They took their case to the highest administrative court, where they argued that what they did, i.e. making their workers available to other companies, was a service that falls within the scope of Article 56 TFEU and that the Temporary Agency Exception is incompatible with the freedom to provide cross-border services within the EU. The government countered that a situation where a non-EU (or, in this case, a Polish) temporary agency hires out workers to a user company in an EU country is not covered by the rules regarding freedom to provide services, but by the rules in respect of free movement. The court referred two questions to the ECJ. The first was whether the Temporary Agency Exception was covered by Para 2(2) Annex XII, in other words, whether temporary agency work is governed by the rules in respect of free movement and not by those in respect of freedom to provide services. The second was how to define "hiring out".

ECJ's ruling

1. The ECJ begins by recalling its previous rulings (including *Webb*, C-279/80) that, where an undertaking hires out staff who remain in its employment, no contract of employment being entered into with the user, its activities constitute an occupation that qualifies as a "service" within the meaning of Articles 56/57 TFEU (§ 27).
2. However, the ECJ has acknowledged that such activities may have an impact on the receiving Member State and that "temps" may in certain circumstances be covered by Articles 45/48 TFEU in respect of free movement. In *Rush Portuguesa*, the ECJ held that a temporary employment agency, although a supplier of services within the meaning of the TFEU, carries on activities that are specifically intended to enable workers to gain access to the job market of the host Member State. A "temp" typically occupies a post within the user company that would otherwise have been occupied by a person employed by that undertaking. It follows that legislation such as the Temporary Agency Exception must be considered to be a measure regulating access of Polish nationals to the job market of (in this case) The Netherlands. Therefore, the Temporary Agency Exception is compatible with Articles 56 and 57 TFEU (§ 28-33).
3. This finding follows from the purpose of Para 2(2) Annex XII, which was intended to prevent disturbances in the job market of the existing Member States (§ 34). It is artificial to draw a distinction between the influx of workers on that job market and whether they gain access to it as a "temp" or directly and independently as an employee of a user company, because in both cases a potentially large influx of workers is capable of disturbing the job market (§ 35).
4. The fact that Annex XII to the 2003 Accession Agreement allows Germany and Austria to derogate temporarily from Article 56 TFEU in respect of Polish workers does not preclude other Member States from applying their national measures in respect of the hiring out of Polish workers (§ 38-40).
5. The hiring out of "temps" falls within the scope of Article 3 of the Posting Directive 96/71, which gives definitions of several forms of posting. As these definitions make clear, there is a distinction between, on the one hand, the posting of workers by their employer to another Member State as a measure ancillary to a provision of services (Article 1(3)(a)) and, on the other hand, a movement of workers to another Member State constituting the very purpose of a trans-national provision of services, as in the case with "temps" (Article 1(3)(c)). A "temp" remains in the employment of the temporary employment agency during the period of posting, but he or she works for and under the control of the user company (§ 42-48).
6. The ECJ does, however, note that situations that at first sight resemble hiring out can in fact constitute the provision of a service and vice-versa (§ 50).
7. **Ruling**: Articles 56 and 57 TFEU do not preclude a Member State from making the hiring-out of workers from the Member States that acceded to the EU in 2004 subject to a work permit requirement during the relevant transitional period. Cross-border hiring-out of workers is characterised by the fact that the movement of workers to the host Member State constitutes the very purpose of the services provided by the workers' employer.

ECJ 1 March 2011 (Grand Chamber), case C-236/09 *(Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt and Charles Basselier – v – Council of Ministers)* ("**Test-Achats**"), Belgian case, opinion A-G Kokott in EELC 2010/5 p45 (SEX DISCRIMINATION)

Facts

In 2008, the Belgian Consumers' Association *Test-Achats* and two individuals brought an action before the Belgian Constitutional Court seeking annulment of Article 5(2) of Directive 2004/113, which implements the principle of equal treatment between men and women in the access to and supply of goods and services ("the Directive"). Article 5(1) of the Directive enshrines the principle of "unisex" insurance premiums and benefits, literally providing: *"Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits"*. Article 5(2) derogates from this principle by providing that *"Member States may decide before 21 December 2007 to permit proportional differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data"*. The Belgian law transposing the Directive made use of this derogation possibility.

National Proceedings

The Constitutional Court decided to stay the proceedings and to refer two questions to the ECJ. The first was whether Article 5(2) of the Directive is compatible with Article 6(2) EU and the principle of gender equality. The ECJ did not address the second question.

Article 6(2) EU, as it read before the Lisbon Treaty, provided that the EU must respect fundamental rights, as guaranteed by the ECHR and the Member States' constitutional traditions, as general principles of Community Law. Article 6 EU was replaced on 1 December 2009 (Lisbon Treaty) by Article 6 TEU, which repeats these provisions and also refers to the Charter of Fundamental Rights of the EU ("the Charter"), which has *"the same value as the Treaties"* and which requires the Member States to ensure gender equality.

ECJ's ruling

1. Following a summary of various provisions of EU law in the field of non-discrimination (§ 16-21), the ECJ notes that the use of actuarial factors relating to sex was widespread in the provision of insurance services at the time the Directive was adopted in 2004. Consequently, it was permissible for the EU legislature to implement the principle of gender equality gradually, with appropriate transitional periods (§ 22-23).
2. Article 5(2) of the Directive grants Member States the option to

permit certain gender-based actuarial factors. However, given that the Directive is silent on the length of time during which such gender differences may continue to apply, it permits Member States that have made use of the option to allow insurers to apply unequal treatment without any temporal limitation (§ 24-26).

3. Is this gender-discriminatory? The Council argues that it is not, seeing that Article 5(2) merely intends to make it possible not to treat different situations in the same way. The ECJ has consistently held different treatment of different situations to be a requirement in the absence of objective justification (e.g. in case C-127/07, *Arcelor Atlantique)* (§ 27-28).
4. The comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure that makes the distinction in question. In the present case, that distinction is made by Article 5(2) of the Directive (§ 29).
5. Recital 19 to the Directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit "exemptions". The use of this expression signifies that the Directive is based on the premise that the respective situations of men and women with regard to insurance premiums and benefits are comparable (§ 30-31).
6. The combination of point 2 above (no temporal limitation) and point 5 above (the option not to apply unisex factors is gender-discriminatory) creates the risk that EU law may permit gender inequality to persist indefinitely. This works against the achievement of gender equality, which is the purpose of the Directive, and is incompatible with Articles 21 and 23 of the Charter (§ 32).
7. Article 5(2) of the Directive must therefore be considered to be invalid upon the expiry of an appropriate period, namely with effect from 21 December 2012 (§ 33-34).
8. **Ruling**: Article 5(2) of Directive 2004/113/EC is invalid with effect from 21 December 2012.

ECJ 3 March 2011, joined cases C-235/10 to C-239/20 (*David Claes et al – v – Landsbanki Luxembourg SA in liquidation*) ("**Claes**"), Luxembourg case (COLLECTIVE REDUNDANCY)

Facts

Landsbanki is a credit institution established in Luxembourg. In October 2008, the District Court in Luxembourg made Landsbanki subject to the suspension of payments procedure. Subsequently, Landsbanki was dissolved. The court ordered its winding up and appointed two liquidators. They dismissed the employees in accordance with Luxembourg law, which allows immediate dismissal in such cases.

National Proceedings

The five plaintiffs turned to the Labour Court, seeking a declaration that their redundancies were of no effect, since, in four of the cases, they were staff representatives and, in one, a pregnant woman. The plaintiffs applied for their immediate reinstatement. The court of first instance denied the application, given that circumstances made reinstatement literally impossible. The Court of Appeal dismissed the appeals. The plaintiffs took the matter to the Supreme Court. It referred two questions to the ECJ, both relating to Directive 98/59 on collective redundancies ("the Directive"). The first question was whether the Directive applies to a termination of activities as a result of a judicial decision ordering the dissolution and winding up of an insolvent credit institution. The second question was whether, if so, the employer's duty to consult with the workers' representatives falls on the liquidator(s).

ECJ's ruling

1. The ECJ begins by summarising the Directive's history. Its predecessor, Directive 25/129, originally provided that it did not apply to workers affected by the termination of an establishment's activities where that is the result of a judicial decision. This exception was removed by Directive 92/56. The current Directive 98/59 retains Directive 92/56's relevant provisions. Thus, the Directive's scope covers collective redundancies arising from termination of an establishment's activities where that is the result of a judicial decision (§ 30-43).
2. That finding is not affected by the ECJ's ruling in the *Rodríguez Mayor* case (C-323/08), which concerned an employer who died without heirs. Such a situation, which does not fall within the concept of collective redundancy, is substantially different from that where a business is wound up following a judicial decision (§ 44-46).
3. In an insolvency case, the legal personality of an establishment, the dissolution and winding up of which have been ordered by a judicial decision, exists for limited purposes only. Nevertheless, it has a duty up until the moment when it definitively ceases to exist, to fulfil the requirements incumbent on employers under the Directive. If management has been taken over by a liquidator, it is he or she who must fulfil these duties, which include not only ways and means of avoiding redundancies or reducing the number of workers affected, but also to mitigate the consequences of redundancies, for example, through social measures aimed at redeploying or retraining the redundant workers (§ 53-56).
4. **Ruling**: the Directive applies to a termination of the activities of an employer as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect. As long as the employer exists as a legal entity, its duty to consult with the staff's representatives must be carried out by management or by its liquidator.

ECJ 10 March 2011, case C-109/09 *(Deutsche Lufthansa AG – v – Gertraud Kumpan)* ("**Lufthansa**"), German case, no opinion Advocate-General (FIXED–TERM WORK)

Facts

Ms Kumpan was a Lufthansa stewardess whose employment contract was governed by a collective agreement. Article 19 of this agreement provided:

"1. The employment contract shall end - without any notice being required – at the end of the month in which the age of 55 is reached.

2. Where physically and occupationally fit, a cabin staff member's employment contract may be extended beyond the age of 55 by mutual agreement. Where a cabin staff member's employment contract is renewed, it shall end – without any notice being required – at the end of the month in which the cabin staff member's next birthday falls. Further renewal is permitted. The employment contract shall in any event end – without any notice being required – at the end of the month in which the cabin staff member reaches the age of 60."

Ms Kumpan's contract was originally for an indefinite period of time (permanent contract). When it ended at age 55, she entered into five consecutive one-year contracts, the last of which expired on 30 April 2005, the month in which she turned 60. She asked Lufthansa if she could continue working and, when her request was denied, she lodged a claim with the Labour Court in Frankfurt. She submitted that Article 19(2) of the collective agreement was incompatible with Paragraph

14(3) of a German law known as "TzBfG" ("*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*"), which is the German transposition of Directive 1999/70 on fixed-term work (the "Directive").

Paragraph 14(1) TzBfG provides that a fixed-term employment contract may only be concluded, if there are objective grounds for doing so, such as a temporary need for manpower. By way of exception, paragraph 14(2) TzBfG allows fixed-term contracts in the absence of objective reasons, but only for a maximum of two years and three consecutive contracts. Paragraph 14(3) TzBfG, which was at the heart of this dispute, was amended on 1 January 2003 and again on 1 January 2007. In the relevant period 2004/2005, paragraph 14(3) TzBfG provided:

"*The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 52 by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close objective connection with a previous employment contract of indefinite duration concluded with the same employer. Such a connection shall be presumed to exist inter alia where the interval between the two employment contracts is less than six months*".

National Proceedings

The court of first instance dismissed Ms Kumpan's application, but this judgment was overturned on appeal. Lufthansa appealed to the highest German court in employment matters, the "BAG", which referred three questions to the ECJ. The first question asked whether EU law on age discrimination precludes a provision of national law that allows fixed-term contracts to be agreed without further conditions simply because a worker has reached a certain age. The second question asked whether Clause 5(1) of the Framework Agreement on Fixed-Term Work, annexed to the Directive, (the "Framework Agreement") precludes such a provision of national law. Thirdly, the BAG wished to know whether, if the answer to question 1 and/or question 2 was affirmative, the national courts must dis-apply the relevant provision of their domestic law.

ECJ's ruling

1. The ECJ, addressing the second and third questions first, begins by analysing Clause 5(1) of the Framework Agreement. This clause compels the Member States "*where there are no equivalent legal measures to prevent abuse*", to limit the use of fixed-term contracts by introducing one or more of three measures: (a) objective reasons, (b) maximum total duration, and (c) maximum number of renewals. This allows the Member States a certain discretion as to how they achieve the Framework Agreement's objective of preventing abuse. This discretion must, however, be exercised in compliance with EU law (§ 30-37).
2. The purpose of Paragraph 14(3) TzBfG is to promote vocational integration of unemployed older workers. However, it applies to all older workers, including those who are employed, depriving those workers of the protective measures set out in Clause 5(1) of the Framework Agreement (§ 38-41).
3. As already held by the ECJ in its *Adeneler* judgment (case C-212/04), a national provision that allows successive fixed-term contracts in a general and abstract manner by a rule of statute or secondary legislation, does not accord with Clause 5(1), unless the national legislation in question contains another effective equivalent measure to prevent and, where relevant, penalise the misuse of successive fixed-term contracts (§ 42-44).
4. Paragraph 14(3) TzBfG limits the use of fixed-term contracts for older employees by prohibiting such contracts "*where there is a close objective connection with a previous employment contract of indefinite duration concluded with the same employer*", such a connection being presumed to exist where the interval between the two contracts is less than six months. This limitation does not apply to an older worker such as Ms Kumpan, whose fixed-term contract (the fifth in a row) began more than six months after her permanent contract ended. This means that older workers whose permanent contract is succeeded by one or more fixed-term contracts with a duration exceeding six months, lack all protection against abuse of fixed-term contracts. This makes Paragraph 14(3) TzBfG incompatible with Clause 5(1) of the Framework Agreement (§ 45-50).
5. Given that Clause 5(1) allows the Member States discretion as to the measures they adopt to comply with it, Clause 5(1) is neither unconditional nor sufficiently precise for individuals to rely on it before a national court. Therefore, it has no direct effect. However, the national courts must do all they reasonably can to interpret their domestic law in line with the Directive (§ 51-56).
6. In view of the above, it is not necessary to answer the first question (§ 58).
7. **Ruling**: Clause 5(1) of the Framework Agreement must be interpreted as meaning that the concept of "*a close objective connection with a previous employment contract of indefinite duration concluded with the same employer*" in Paragraph 14(3) TzBfG must also be applied to situations in which a fixed-term contract has not been preceded less than six months previously by an indefinite contract, where the initial employment relationship continued for the same activity by means of an uninterrupted succession of fixed-term contracts.

ECJ 10 March 2011, case C-477/09 (*Charles Defossez - v - Christian Wart, in his capacity as liquidator of Sotimon Sarl and others*) ("**Defossez**"), French case (INSOLVENCY)

Facts

Mr Defossez was employed by the French company Sotimon, for whom he worked in Belgium. Sotimon dismissed him in December 2003. He brought a claim against Sotimon and in 2006 a French court awarded him compensation. By this time, however, Sotimon had been wound up, for which reason the French court declared its judgment to be enforceable against the relevant guarantee institution under Directive 80/987, in this case the French guarantee institution "CGEA". In 2008, another French court that dealt with the winding-up of Sotimon accepted Mr Defossez's claim, but ruled that it could only be enforced against the relevant Belgian guarantee institution "FFE". Mr Defossez, who preferred to bring a claim against the CGEA, appealed to the *Cour de cassation*, the French Supreme Court.

National proceedings

The *Cour de cassation* referred to the ECJ questions regarding the interpretation of Article 8a of Directive 80/987, a provision that was introduced by Directive 2002/74. Article 8a deals with the complications that can arise when an undertaking with activities in more than one Member State becomes insolvent. In such a situation, the competent guarantee institution is that of the Member State in whose territory the employees work or habitually work. In this case, that was the Belgian FFE, not the French CGEA. Therefore, assuming that Mr Defossez could bring a claim against the FFE, the *Cour de cassation* wished to know whether Article 8a of Directive 80/987 is to be interpreted as not depriving an employee of the right to take advantage, in the place of

the competent guarantee institution (i.e. the FFE), of a more favourable guarantee from the institution with which his or her employer was insured and to which it made contributions under its national law (i.e. the CGEA).

ECJ's ruling

1. Article 8a of Directive 80/987 was introduced by Directive 2002/74. The transposition deadline for that Directive was 8 October 2005. Therefore, given that Sotimon was wound up before that date, the insolvency did not fall within the scope of Directive 2002/74. Thus, the question referred by the *Cour de cassation* needs to be answered by interpreting Directive 80/987 as it read before it was amended, i.e. before Article 8a was introduced (§ 18-23).
2. In its 1997 ruling in the *Masbaek* case (C-117/96), the ECJ had held that the competent guarantee institution is that of the Member State in which the proceedings for the collective satisfaction of creditors' claims was opened or in which it was established that the employer's undertaking was definitely closed down. In its 1999 ruling in the *Everson* case (C-198/98), the ECJ had held that where the insolvent employer had a branch in the Member State where the employees were employed, the institution responsible for paying outstanding claims is that of the Member States where that branch is established (§ 24-27).
3. In the present case, where the employer was established in France, the contributions for covering potential salary claims were paid in France and the employer did not have any stable business establishment in Belgium, the relevant elements of the case have a closer resemblance to *Masbaek* than to *Everson*. Therefore, the competent guarantee institution is the French CGEA (§ 28-30).
4. Directive 80/987 does not preclude a Member State's legislation from providing that employees may avail themselves of the salary guarantee from that Member State's institution, either in addition to or instead of the guarantee offered by the competent guarantee institution under the Directive, if that guarantee results in a greater level of worker protection (§ 31-33).
5. **Ruling**: Article 3 of Directive 80/987 in the pre-Directive 2002/74 version is to be interpreted as meaning that, for the payment of the outstanding claims of workers having been habitually employed in a Member State other than that where their employer was established, where the employer was declared insolvent before 8 October 2005 and that employer is not established in that other Member State and fulfils its obligation to contribute to the financing of the guarantee institution in the Member State where it is established, that institution will be liable. However, Member States may allow employees to claim under a more favourable regime.

ECJ 15 March 2011 (Grand Chamber), case C-29/10 (*Heiko Koelzsch – v – Luxembourg*) ("**Koelzsch**"), Luxembourg case (ROME CONVENTION ON APPLICABLE LAW)

Facts

Mr Koelzsch was a truck driver who lived in Germany. He was employed by the Luxembourg company Gasa, a subsidiary of a Danish firm. His work consisted of transporting flowers and plants from Denmark to destinations all over Europe, mainly Germany. Gasa's trucks were registered in Luxembourg but were stationed in Germany. Gasa had no seat or office in Germany.

The employment contract between Gasa and Mr Koelzsch was executed in Luxembourg. It provided that Luxembourg law governed the contract and that exclusively the courts in Luxembourg had jurisdiction.

In 2001, one week after he was elected as a (alternate) member of Gasa's works council, Mr Koelzsch was terminated as part of a restructuring operation. He challenged his dismissal in a German court that, however, declared itself to lack jurisdiction. Subsequently, he brought proceedings in Luxembourg, seeking damages for unfair dismissal, compensation in lieu of notice and arrears of salary. These proceedings, which began in the Labour Court and ended in the Supreme Court, are referred to below as "Proceedings I". In those proceedings, Mr Koelzsch argued that, notwithstanding the choice of law in his employment contract, the mandatory rules of German law protecting works council members were applicable to the dispute pursuant to Article 6(1) of the Convention on the law applicable to contractual obligations (opened for signature in Rome on 19 June 1980) ("the Rome Convention"). This Article 6(1) provides that *"in a contract of employment a choice of law shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice"*. Paragraph 2 provides that, in the absence of a choice of law, an employment contract must be governed by (a) the law of the country in which the employee habitually carries out work or, if the employee does not habitually carry out work in any one country, (b) the law of the country in which the employer's place of business is situated. As Mr Koelzsch habitually worked in Germany, so he argued, the mandatory provisions of German law protecting works council members against dismissal applied.

As appears below, Proceedings I ended unfavourably for Mr Koelzsch. This led him to bring a *Francovich*-type action before the District Court in Luxembourg, in which he sought damages against the Luxembourg government for failure by the courts in Proceedings I to apply Article 6(1) and (2). The proceedings that began with this action are referred to below as "Proceedings II".

National Proceedings

In Proceedings I, the Labour Court held that the dispute was governed exclusively by Luxembourg Law. Appeals to the Court of Appeal and the Supreme Court were unsuccessful. The Supreme Court was not willing to refer questions to the ECJ.

In Proceedings II, the District Court held that the judgments in Proceedings I had been correct. On appeal, however the Court of Appeal decided that it was necessary to seek guidance from the ECJ. The Court of Appeal took the view that the concept of the *"law of the country in which the employee habitually carries out his work"* in the Rome Convention needs to be interpreted in the same manner as Article 5(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("the Brussels Convention"), which utilise the same concept. The referring court noted that the Rome Convention was replaced in 2008 by Regulation (EC) no 593/2008 (which applies to contracts concluded after 17 December 2009) and that the Brussels Convention was replaced by Regulation (EC) no 44/2001. Although neither of these Regulations applied to the dispute in question, which arose in 2001, they can perhaps shed light on the interpretation of the Rome and Brussels Conventions.

ECJ's ruling

1. The criterion of the country in which the employee *"habitually carries out his work"* must be interpreted autonomously, i.e. independently of the laws of the country of the court where the action is pending (§ 31-32).
2. The Rome Convention must be interpreted in line with the Brussels Convention (§ 33).
3. In essence, the issue is whether to apply Article 6(2)(a) of the Rome Convention (the place where the employee habitually carries out work, in this case, Luxembourg) or Article 6(2)(b) (the employer's location, in this case, Germany) (§ 36-37).
4. As is apparent from the Giuliano and Lagarde report [which led to the Rome Convention, PVN], Article 6 of the Rome Convention was intended to provide *"a more appropriate arrangement for matters in which the interests of one of the contracting parties are not the same as those of the other, and [...] more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship"*. In previous cases, the ECJ took this intention into account, holding that the objective of Article 6 of the Rome Convention is to guarantee, as far as possible, the applicability of the law of the Member State where the employee works rather than that of the Member State in which the employer is established. Consequently, criterion (a) (the country in which the employee habitually carries out work) must be given a broad interpretation, while criterion (b) (the employer's place of business) ought to be limited to cases where the relevant court is unable to determine the country in which the work is habitually carried out. It follows that criterion (a) can also apply in a situation where the employee carries out activities in more than one Member State, provided that it is possible to determine the State with which the work has a significant connection (§ 40-44).
5. According to the ECJ's case law on the Brussels Convention, criterion (a) must be understood as referring to the place in which or from which the employee actually carries out his or her working activities and, in the absence of a centre of activities, to the place where he or she carries out the majority of activities. That interpretation is consistent with Regulation 593/2008 (§ 45-47).
6. Accordingly, as regards the international transport sector, the referring court must take account of all the factors that characterise the employee's activities. In particular, it must determine in which Member State is situated the place from which the employee carries out transport tasks, receives instructions and organises his or her work, the place where the work tools are situated, the places where the transport is principally carried out, where the goods are unloaded and the place to which he or she returns after completion of the tasks (§ 48-49).
7. **Ruling**: Article 6(2)(a) of the Rome Convention means that, in a situation in which an employee works in more than one EU country, the country in which he or she habitually carries out work is that in which or from which he or she performs the greater part of his or her duties towards the employer.

Note: Case C-230/10 (*Saenz Morales*) was withdrawn on 3 February 2001

PENDING CASES

Case C-517/10 (*María Luisa Gómez Cueto – v – Administración de Estato*), reference lodged by the Spanish *Tribunal Superior de Justicia de Canarias* on 2 November 2010 (FIXED-TERM CONTRACTS)

Is Directive 199/70 applicable to civil servants? If so, is a national law transposing the Directive without retroactive effect, contrary to Community Law?

Case C-571/10 (*Servet Kamberaj – v – Instituto Per L' Edilizia Sociale*), reference lodged by the Italian *Tribunale di Bolzano* on 7 December 2010 (NATIONALITY DISCRIMINATION)

Must a national court disapply domestic law that is in conflict with EU law, even if it was adopted in accordance with fundamental principles of the Member State's constitutional system?

If domestic law conflicts with Article 14 of the ECHR, must a national court dis-apply the incompatible source of domestic law without first having to raise the issue of constitutionality before the national constitutional court?

Does EU non-discrimination law preclude a housing benefit that discriminates in favour of EU nationals?

Must Article 15 of Directive 2000/43, insofar as it provides that sanctions must be effective, proportionate and dissuasive, be interpreted as including all infringements affecting the discriminated persons, even if they do not form part of the dispute?

Is it contrary to EU law for a national provision to require community nationals (including Italians) to make a declaration that they ethically belong to one of the three linguistic groups of the *Alto Adige / Südtirol* region in order to be eligible for housing benefits?

Is it contrary to EU law for a national provision to impose on community nationals (including Italians) the duty to have resided or worked in a certain province for at least five years in order to be eligible for housing benefits?

Case C-583/10 (*United states of America – v – Christine Nolan*), reference lodged by the Court of Appeal (England & Wales) (Civil Division) on 13 December 2010 (COLLECTIVE REDUNDANCY)

Does the employer's duty to consult about collective redundancies, pursuant to Directive 98/59, arise (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (ii) only when that decision has actually been made and it is then proposing consequential redundancies?

Case C-586/10 (*Bianca Kücük – v – Land Nordrhein-Westfalen*), reference lodged by the German *"Bundesarbeitsgericht"* on 15 December 2010 (FIXED-TERM CONTRACTS)

Is it in breach of Clause 5(1) of the Framework Agreement on fixed-term work for a national provision that provides objective grounds for repeated fixed-term work (where one employee replaces another), to be interpreted and applied to mean that there are also objective grounds where there is a permanent need for a replacement? This question is relevant where, although the need for a replacement could actually be met by the employee concerned being employed for an indefinite duration and the replacement duties of one of the regular lost staff being assigned to him or her, the employer reserves the right to decide anew in each case how it is to respond to a specific loss of staff.

If so, is such an interpretation in breach of Clause 5(1), even where the national legislature also pursues the social policy objective of making it easier for an employer to grant special leave and for an employee to avail himself or herself of it for reason of maternity protection or parenting, for instance?

ECtHR COURT WATCH

Summaries by Paul Diamond, barrister (UK)

ECtHR 5 October 2010, Kopke – v – Germany (Application no 420/07) (PRIVATE LIFE); *Lalmahomed – v – The Netherlands* (Application no 26036/08); and *Cudak – v – Lithuania* (Application no 15869/02) (RIGHT TO A FAIR HEARING)

Introduction

The European Court of Human Rights ("ECtHR") has recently considered these cases, which have a direct and indirect impact on employment law. *Kopke* raises issues of an employer using covert surveillance on an employee to investigate and prevent theft. *Lalmahomed* was a criminal case, but illuminates the strict requirements of the need for a fair procedure. *Cudak* is a case in which the right to bring a claim for unfair dismissal was given primacy over the public international law principle of state immunity.

Facts

In *Kopke*, a shop assistant and cashier was dismissed after some 11 years' employment on grounds of theft, namely taking money from the cash register. The employer was concerned with the taking of monies from the tills in the drinks department and used a private detective agency to engage in covert video surveillance of the employee. The employee denied theft, claiming she was simply taking the tips she was entitled to. She commenced proceedings in the Labour Court for her dismissal and sought compensation for the covert surveillance. Further, she requested that the videotapes be given to her. After losing in the Labour Court, she appealed to the Labour Court of Appeal, to the Federal Labour Court and finally submitted a complaint to the Constitutional Court. She was unsuccessful at every level and her claim was dismissed. Thereafter, she made an application to the ECtHR under Article 8 for breach of her rights of privacy.

In *Lalmahomed*, an individual was taken to court for failing to present an identity document. He failed to attend court and was tried *in absentia*. Thereafter, he sought to appeal, but was subject to the 'leave to appeal' special procedure in which a single judge can refuse an appeal on the papers without hearing the accused. An application was made to the European Court on the grounds that this process failed to comply with the fair trial procedures of Article 6. The defendant was denied any opportunity *'to defend himself in person or through legal assistance of his own choosing…'*, as provided by Article 6(1)(3)(c).

In *Cudak*, a Lithuanian employee was recruited by the Polish embassy in Vilnius. She was employed in a secretarial capacity and was dismissed because of poor health, consequential on sexual harassment from a fellow employee. Her claim for unfair dismissal was struck out by the Regional Court, Court of Appeal and Supreme Court on jurisdictional grounds, namely that the doctrine of State immunity applied. She applied to the ECtHR for breach of Article 6(1), as the domestic courts had violated her right of access to a court.

ECtHR's judgments

In *Kopke*, the ECtHR had to examine whether the balance struck by the German labour courts between the applicant's right to respect for her private life under Article 8 ECHR on the one hand, and the rights of the employer to protect its property rights on the other, had sufficiently respected the applicant's rights. The ECtHR held that the German courts had correctly balanced the interests of the employer and employee. The ECtHR held that the use of the covert surveillance was proportionate and there was no violation of Article 8.

The decision of the Labour Court had held there was, in effect, no other realistic means by which the employer could have acted to ascertain the source of the theft. The defence of the shop assistant (that she was simply removing her tips) was considered irrelevant, as an employer could not be expected to employ a person who put money from the till into her own pockets without keeping any records.

The ECtHR considered the wider implications of the growth of ever more sophisticated technologies by which an employer can 'snoop' on their employees and specifically limited their judgment to the facts of the case (implying a limitation on the use of this tactic). After considering the importance of the right to privacy and the duty of the State to *positively* secure fundamental rights, the Court addressed the question of proportionality.

The employer had used covert surveillance to secure a legitimate property interest, in which it sought to prevent further significant losses. The surveillance was not directed at all employees or at customers, but was specifically directed at two employees. The surveillance was both limited in time and place and was found necessary in the interests of justice (without it an innocent employee might have been accused).

In *Lalmahomed*, the 'leave to appeal' process on the facts of this case came under the supervision of the ECtHR for compatibility with Article 6. Certainly, the case lacked merit in that Mr Lalmahomed missed his own court hearing and raised an unlikely defence that someone else was impersonating him. However, the new 'leave to appeal' procedure permitted this case to arise. The defendant failed to appear in Court and judgment was therefore given *in absentia* and the 'leave to appeal' process meant he was only permitted an appeal on the papers. Thus, the full defence of Mr Lalmahomed was never fully considered by the Court. Clearly, the single judge considering the appeal thought the case lacked any merit, but the right to a fair trial required important safeguards and efficacy was not a justification.

In *Cudak,* the ECtHR showed itself as a court that is both a 'constitutional court' for the Member States of the Council of Europe, and an 'international court'. The ECtHR held that recognised principles of public international law were part of the corpus of its jurisprudence and went on to consider the impact of the doctrine of state immunity on the right of an employee to claim for unfair dismissal.

The ECtHR held that Ms Cudak was denied access to the court. She was employed in secretarial work, which raised no issues relating to the sovereign interests of Poland. Consequently, there was no reason why she could not seek unfair dismissal like any other similar employee. The ECtHR considered the 2004 Convention on State Immunity (which Lithuania had not ratified) represented customary international law to which Lithuania was bound and which was given effect through Article 6 the European Convention.

Commentary

These decisions raise a number of concerns and issues. Whilst *Kopke* is an eminently sensible decision on its facts, it is interesting how the ECtHR approached its decision. Considerable emphasis was placed on the right to privacy which had, *prima facie*, been interfered with. The Court reiterated that privacy extends to aspects of personal identity,

such as a person's name or picture (*Hanover – v – Germany no 59320/00).*

The case was always going to be one based on 'proportionality'. It has re-enforced common sense and has enabled employers to act decisively in order to detect and deter crime. The ECtHR considered that the German Data Protection Act 2009, which permitted the use of personal data in order to detect crime in certain circumstances, had correctly transposed Directive 95/46/EC (although that question is ultimately for Luxembourg).

The United Kingdom may have as many as four million CCTVs in which the average person can have his or her image caught between 70 and 300 times a day (the exact figure is uncertain). Most of these CCTV cameras are not related to the detection of a specific crime, but are directed towards innocent citizens in shops and streets. Their use is not limited in time. It is difficult to see how a general need to detect crime can be compatible with a right to privacy or with the presumption of innocence protected by Article 6(2).

Lalmahomed is a criminal case, but raised issues of procedure, especially in relation to Labour Courts and professional disciplinary tribunals. Many labour tribunals and professional disciplinary bodies have cost efficient proceedings. Whilst often reserved for 'minor' matters, such issues can be of crucial importance to both employer and employee. In *Lalmahomed*, the ECtHR was specifically critical of the Dutch Government's position on the need to filter out minor and hopeless appeals. The ECtHR held that '*the right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience*' (paragraph 36).

As the decision was based on the facts of the case, rather than a review of the Dutch 'leave to appeal' procedures' compatibility with Article 6, such measures of expediency may still be compatible with the Convention. However, it is important that any judicial or quasi-judicial process enable parties to put their case in full, that any judge/decision maker is possessed of all the facts that any party wishes to submit and gives a reasoned judgment/decision.

It is unlikely that the facts of *Cudak* will have an impact on many employment lawyers. The doctrine of public international law in relation to immunities is more important in the criminal sphere than the labour sphere. However, in a number of recent decisions, the ECtHR has considered both the impact of EU Directives and international Conventions. The decision by the ECtHR to adjudicate on customary international law and hold Lithuania bound by a Convention that it has not signed, in itself raises issues of national sovereignty.

TRANSFER OF UNDERTAKINGS

Status of Directive 2001/23

2010/42 (FR) no horizontal direct effect
2010/74 (AT) employer can invoke vertical direct effect

Is there a transfer?

2009/5 (MT) contracting out cleaning is a transfer despite no assets or staff going across
2009/22 (BE) collective agreement cannot create transfer where there is none by law
2009/41 (GE) BAG follows *Klarenberg*
2009/42 (UK) EAT clarifies "service provision change" concept
2010/1 (FR) Supreme Court drops "autonomy" requirement
2010/4 (SP) Supreme Court follows *Abler*, applying assets/staff mix
2010/5 (LU) court applies *Abler* despite changes in catering system
2010/6 (IT) Supreme Court disapplies national law
2010/27 (NL) assigned staff not an economic entity
2010/40 (NO) Supreme Court applies comprehensive mix of all *Spijkers* criteria
2010/73 (CZ) Supreme Court accepts broad transfer definition

Cross-border transfer

2009/3 (NL) move from NL to BE is transfer
2011/3 (UK) TUPE applies to move from UK to Israel

Which employees cross over?

2009/2 (NL) do assigned staff cross over? *Albron* case
2010/24 (NL) temporarily assigned staff do not cross over
2011/1 (FR) partial transfer?
2011/2 (FR) partial transfer?

Employee who refuses to transfer

2009/20 (IR) no redundancy pay for employee refusing to transfer
2009/21 (FI) transferee liable to employee refusing to transfer on inferior terms
2009/23 (NL) agreement to remain with transferor effective

Termination

2010/2 (SE) status of termination prior to transfer
2010/41 (CZ) termination by transferor, then "new" contract with transferee ineffective

Which terms go across?

2009/4 (NL) terms closely linked to transferor's business are lost
2010/3 (P) transferee liable for fine levied against transferor
2010/25 (FI) voluntary pension scheme goes across
2010/56 (CZ) claim for invalid dismissal goes across
2010/75 (AT) not all collective terms go across

Duty to inform

2009/43 (NL) transferor must inform staff fully
2010/42 (FR) no duty to inform because directive not transposed fully
2011/4 (GE) *Widerspruch* deadline begins after accurate information given

Miscellaneous

2009/1 (IT) transfer with sole aim of easing staff reduction is abuse
2010/23 (AT) transferee may recover from transferor cost of annual leave accrued before transfer
20120/26 (GE) purchaser of insolvent company may offer transferred staff inferior terms

DISCRIMINATION

General

2009/29 (PL) court must apply to discriminated group provision designed for benefit of privileged group
2010/9 (UK) associative discrimination (*Coleman* part II)
2010/11 (GE) attending annual salary review meeting is term of employment
2010/12 (BE) *Feryn*, part II
2010/32 (CZ) Czech court applies reversal of burden of proof doctrine for first time
2010/62 (GE) court asks ECJ to assess compatibility of time-bar rule with EU law
2010/78 (IR) rules re direct discrimination may be applied to claim based solely on indirect discrimination
2010/83 (UK) employee barred from using information provided "without prejudice"

Job application

2009/27 (AT) employer liable following discriminatory remark that did not influence application
2009/28 (HU) what can rejected applicant claim?
2010/31 (P) age in advertisement not justified
2010/84 (GE) court asks ECJ whether rejected applicant may know whether another got the job and why

Gender, termination

2009/6 (SP) dismissal of pregnant worker void even if employer unaware of pregnancy
2009/10 (PL) lower retirement age for women indirectly discriminatory
2010/33 (HU) dismissal unlawful even though employee unaware she was pregnant
2010/44 (DK) dismissal of pregnant worker allowed despite no "exceptional case"
2010/46 (GR) dismissal prohibition also applies after having stillborn baby
2010/60 (DK) dismissal following notice of undergoing fertility treatment not presumptively discriminatory
2010/82 (AT) dismissed pregnant worker cannot claim in absence of work permit

Gender, terms of employment

2009/13 (SE) bonus scheme may penalise maternity leave absence
2009/49 (SP) dress requirement for nurses lawful
2010/47 (IR) employer to provide meaningful work and pay compensation for discriminatory treatment
2010/48 (NL) bonus scheme may pro-rate for maternity leave absence
2010/65 (UK) court reverses "same establishment" doctrine re pay equality

MISCELLANEOUS